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Supreme Court of the United States.

October Term, 1905.

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JAMES H. MCKENNEY,
Clerk.

No. 244.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEVERE, BY HIS NEXT FRIEND, WILLIAM B. SEVERE.

Brief on Behalf of the Plaintiff in Error.

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GEORGE P. HOOVER,
Attorneys for Plaintiff in Error.

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Statement.

This is an action for damages by appellee against appellant for a personal injury. The appellee had a verdict and judgment in the court below. He was run over by one of the cars of appellant, and his leg was so severely injured that it was amputated about half-way between the ankle and knee. The accident occurred near Riverdale, Maryland, at a plank crossing of the railroad company where the cars were accustomed to stop whenever there were any passengers to get on or off there, but not otherwise. The road consists of a double track. At the time of the accident the plaintiff was standing on the track on which cars run toward Washington, near the outer or western rail of that track, near the end of the platform nearest to Washington. The car was running towards Washington at the rate of

from eight to ten miles per hour, not intending to stop at the platform, as there were no passengers to get on or off there. As the car approached plaintiff the motorman sounded the gong. At that time there were two other boys with plaintiff and they left the track, but plaintiff did not. The evidence showed that these and other boys had been in the habit of standing on the track at that and other points in that vicinity until the car got very near them and then jumping off as the car got close to them. When the motorman came within about 35 or 40 feet of plaintiff, he saw that his foot wa scaught in the space between the outer rail and the first plank on the inside of it, the space that was left for the flange of the wheel to play in, and immediately put on the brakes and reversed the current and did all he could to stop the car, but did not succeed until it struck plaintiff and injured him as stated above.

The evidence tended to show that the space between the plank and rail where the plaintiff's foot was caught was from 2 to 2 11-16 inches wide; that the crossing was constructed in that way to leave a space for the flanges of the wheels; that it was constructed in the usual manner of constructing such crossings in the District of Columbia and elsewhere; that it was substantially in the same condition as when first constructed some years ago; that there were several other plank crossings in the District of Columbia built in a similar way, and that no accident of such a character had ever occurred in the District of Columbia or elsewhere, so far as the officers and agents of the defendant knew or had heard, either prior or subsequent to the one in question; that the crossing was constructed at the point in question pursuant to a resolution of the county commissioners of Prince George's County and an agreement between the Riverdale Park Company and the railroad company, by which the latter acquired its right of way (Rec., pp. 28-9); that a street was designated on the plat of River-

dale where the tracks of the railroad company were laid known as Maryland avenue, but that street had never been constructed or opened to public travel; that there was another street designated on said plat as street running at right angles with Maryland avenue and crossing it at the place where the plank platform was built; that that street had been opened to travel on the west of Maryland avenue, but not on the east; that there was no thoroughfare along this street across the tracks of the railroad company at this point; that carriages did not and could not cross there; that the land on the east of the railroad tracks at this point was somewhat below the road-bed, but that persons on foot occasionally crossed over and passed east towards the Baltimore & Ohio tracks, which ran east of, and parallel with, the electric car tracks; that the plank crossing or platform extends across both tracks of the electric railroad company and for some 8 or 9 feet beyond the tracks; that the planking fits up closely against the outside of each of the rails of the tracks, but the space hereinbefore described is left on the inside of each track for the flanges of the wheels to play in. It appeared from the evidence introduced on behalf of the plaintiff that he was seven years old, wanting about two months, at the time of the accident; that there were with him at the time his two brothers, one about two years older and the other about two years younger than the plaintiff; that the parents of the plaintiffs lived a short distance west of the railroad tracks; that on the 31st day of August, 1902, the day of the accident, about two o'clock in the afternoon, the three boys went to the railroad, as they testified, to meet their parents, who were away, and were expected home; that they were expected to come from the direction of Washington; that there was no car in sight coming from Washington at the time of the accident, though one could be seen when about five hundred feet away from the scene of the accident; that the parents of the plaintiff did not return until about midnight Sunday, the day of the

accident; that the plaintiff and his brothers remained near the platform playing for an hour or more, when Eddie, the oldest of the three, went back to the house to get a drink of water, leaving his brother at or near the platform; that while he was at the house getting the water the youngest of the three boys, Raymond, came up to the house and told him that the plaintiff had his foot caught in the platform and could not get it out.

Eddie testified that he went down to the crossing; that the car was coming from Riverdale; that when he first saw the car he was within 10 feet of the track; that he waved his hat and hollered for them to stop; that the car was pretty near the plaintiff when he, witness, began to wave his hat and holler; that he could not tell exactly how far it was away, but indicated by pointing to a corner of the room (this distance was measured and found to be 46 feet 6 inches). On cross-examination he was asked about the distance and again indicated by pointing to a post (this distance was measured and found to be 28 feet); that the motorman did not begin to stop the car until it got down near the plaintiff. He also testified that they were down there about an hour before he went up to the house to get a drink of water; that they were at first over by the power-house sitting down on a seat waiting, and after awhile they went over to the track, that they did not stay on the track very long; that he went on the platform with his brothers; that he left his two brothers on the platform when he went up to get a drink of water; that he intended to return and wait for his mother; that when he went down after being told that his brother was caught in the track he went within about 10 feet of the plaintiff; that he did not step on either of the tracks, but on the two boards over a little ditch before coming to the railroad; that that was as near as he went to the plaintiff while he had his foot caught in the platform; that his foot was caught in a rail on the right side as you face Washington.

Plaintiff testified that while his brother Eddie was gone up to the house to get a drink of water Raymond's foot got caught in the platform; that he did not see what Raymond was doing when he got his foot caught; that he helped Raymond get his foot out; that he afterwards got his foot caught and could not get it out; that he saw the car coming; that his back was to it; that when he heard it coming he turned his head to look to see if it was a car; that when he first saw the car it was about as far from him as to the post (indicating the same post last referred to by Eddie); that Eddie waved his hat up and down hollering to the motorman; that he could'nt see whether the motorman was stopping until he got close to him, and then he noticed him and saw him turn the brake to stop; that he never saw the car until Eddie got down there; that he saw Eddie first, and just as he was getting ready to turn around he saw the car; that he did not wave his hat any until he saw the car; that Eddie began to wave his hand just the same time he did; that when he first saw the car it was right close on him; that he was not down there on the crossing a good deal. These two witnesses were the only eye witnesses to the accident on behalf of the plaintiff.

The plaintiff introduced a witnesss, John E. Burch, who was a passenger on the car, but did not see the boy before the accident; that the car stopped with a jolt such as to make him rise up and look out of the window; that the rear end of the car was about one-half its length from the Washington end of the platform when it stopped; that when he first felt the jolt the brakes were put on; that the jolt was unusual enough to make him get up out of his seat; that the car was stopped quickly after he felt the jolt; that it was the unusual jolt that attracted his attention.

William B. Severe, the father of the plaintiff, testified that he measured the space between the rail and the plank where the boy's foot got caught, and according to his

measurement it was 2 11-16 inches from the top of the rail to the edge of the plank or board.

The defendant introduced Ernest F. Hawkins, the motorman in charge of the car, who testified that he had been a motorman ever since the line had been in operation; that he was the motorman of the car that injured the boy; that the car was running on the Washington bound track at the time; that he saw the plaintiff when he was about 300 or 400 feet away; that when he first saw the plaintiff there were three boys on the tracks running and jumping backwards and forwards on the tracks; that they were on the platform or crossing; that he sounded his gong as he approached where they were; that he was about 150 feet away when he first sounded his gong; that when he rang his gong two of the boys got back on the plank; that the other one remained standing on the track; that he rang his gong repeatedly from the time he first rang until he reached the boy, but did not know how often; when he first saw that the boy was not going to get off the track he was about 30 or 35 feet away from him; that he applied the brakes with all his power and reversed the power and stopped the car as quick as he possibly could; that when the car came to a stop it was a little south of the crossing the boy was on before the accident—a little towards Washington; that before the accident the boy was near the Washington end of the crossing; that he had often seen the plaintiff before on the track at that crossing and at Riverdale station, and along between that crossing and Riverdale; that he had seen him remain on the track after he sounded his gong while the car was approaching him; that he did not know how often the plaintiff would stand on the track until the car got almost to him and then jump off and clap his hands and laugh, but lots more than once; that he had seen the plaintiff in company with other boys do the same thing; that he does not know how often, but lots of times; that the first thing he saw or heard on the occasion of the acci-

dent that indicated that the boy might not get off the track was that he saw his foot hung; that he was then within about 30 or 35 feet from him; that all he saw was three boys running back and forth; that he did not see them waving their hands or hats or making any motion; that he did not hear any of them screaming at any time.

On cross-examination he testified that he had known the plaintiff's face for a couple of years and knew the faces of other boys around there; that he knew the two boys who were with plaintiff at that time were his brothers, because they all favored one another; that that was the only way he knew; that the boys continued to run backwards and forwards until he got within 150 feet of them; that they were playing, running, and jumping across the tracks; that the boy who remained on the track remained stationary from that time on until he was struck; that the other two boys were over on the bank; that the boy whose foot was caught did not wave to him; that he did not recognize him until after he was struck; that the boy's face was towards him before he was struck.

The defendant also introduced a witness, John Greensmith, who testified that he was on the car that injured the boy; that he was riding in the front part of the car in the second seat from the motorman, with his face towards the motorman's back; that his attention was called to the motorman by his ringing the bell repeatedly; that he looked out and saw a small boy in the center of the track, but a larger boy than the boy that was injured; that he did not see the plaintiff until after he was injured; that the boy he saw was larger than the plaintiff, and when he saw him he was standing in the center of the track, to the best of his knowledge; that he was waving his hand; that he did not think anything of it as he had often seen the same thing occur at other places; that the next thing that occurred was the motorman stopped his car; that the car just jumped—you could feel a jolt;

that he believes that the motorman was trying all he knew how to stop the car; that he was putting on the brakes with all the force he could; he thinks he stopped the car within thirty seconds or less—not over; that the wheels were slipping; that he could not say how many times the gong was rung before he looked out; that it was the repeated ringing of the gong that called his attention to it. On cross-examination he testified that when he first looked out he was 50 or possibly 35 feet from the place where the car stopped, or it might have been a little further or less; that the boy he saw standing in the middle of the track was about as far from him as to the corner of the room (indicating the same corner referred to by Eddie Severe); that there was nobody in sight that he saw except the one boy; that he could not see the boy that was injured for the reason that the motorman was there and he could not see on that side; that when he first saw the boy the motorman was ringing his gong and that was what attracted his attention; that he then saw the boy wave, and the next thing he noticed was the sudden jolt when the motorman applied the brakes, and that was what made him turn around and look, and just about a moment after he put the brakes on there was a jolt and the car raised up; that he could not say how far the car had gone from where he first noticed the boy before he felt the brakes.

The defendant also introduced as a witness A. S. Bryant, who testified that he was on the car that injured the boy, in the first or second seat from the rear, on the left-hand side, coming towards Washington; that as he approached the place where the accident occurred he got up and walked across to the opposite side and looked out of the window; that the car at that time was between 60 and 100 yards from the place where the injury occurred; that he could see the crossing as he looked out; that when he looked out he saw three boys standing on the platform on the right-hand side of the track the car was running on; that he did

not think they were near enough to the track so that the car would strike them, but they might have been; that he did not observe them all the time until the car got down there; that he just looked out and walked back to his seat; that he had not sat down until the car ran over the boy; that the car stopped very suddenly. On cross-examination the witness testified that he did not see the boys running; that when he looked out they were standing still on the little platform.

The defendant also introduced Thomas W. Phelps, who testified that he had been for about four years a motorman on the City and Suburban line; that he had been running there continuously ever since the road started and was familiar with the place along where the accident happened; that he did not know the Severe boys, but recognized the plaintiff; that he could not remember whether prior to the accident he had seen the plaintiff standing upon the track; that he had frequently seen boys playing along the track; that they would jump out and run across ahead of the cars; that he had seen them stopping and standing on the platform and stopping the cars as they would go along, and then run away laughing when the motorman had stopped; that he had observed this at this particular place and at all the stations along there, and it was a frequent occurrence.

The defendant also introduced as a witness Harry T. Knight, who testified that he had resided at Riverdale for six and a half years; that his house was in the same block with Mr. Severe's—about 250 feet away; that he knew the Severe boys prior to this accident and had occasionally seen the three young Severe boys playing, jumping, and standing on the railroad tracks down near where the platform is and where the accident happened; that he could not tell exactly what they were doing, but he had seen them with his own boys running around the platform and off and on; that he could not say that he had ever seen the boy who was injured standing on the track and jumping off as the car

approached; that he had seen the Severe boys with his own boys and other boys prior to the accident standing on the track at that point as the car approached and jumping off as it did approach; that he could not say how many times he had seen that done before the accident, but it was quite often during the summer. On cross-examination he testified that it occurred right often when the boys would stop in front of a car and when it would come up would jump off just before it got there; when the boys were doing this he was in his garden; that the corner post of his garden was within 30 feet of the railroad track; that when the boys were on the track the motorman would not do anything except ring his bell and the boys would jump off.

The defendant introduced as a witness James B. Lackey, secretary of the City and Suburban Railway Company, who testified that on the day of the accident and after it he measured the space in which the boy's foot was caught and it was scant $2\frac{1}{8}$ inches. (The shoe the boy wore at the time of the accident was produced in court by the plaintiff and this witness testified that he measured the width of it and it measured scant 2 inches at the widest point); the witness also testified that this crossing is constructed in the usual way of constructing crossings of that sort outside of the city limits; that there are a number of them in the District constructed in the same way, and that he never knew or heard of an accident like the one which happened to this boy, either before it happened or afterwards.

The defendant also introduced Fred J. Mersheimer, who testified that he is the special agent of the Claims Department of the railroad company; that he observed Mr. Lackey measure the space and it measured $2\frac{1}{8}$ inches; that he had been connected with street railways since 1883 as adjuster of claims with this company and other companies in the District of Columbia and in New Jersey; that the plank crossing in question was practically the same as all other plank crossings; that in his experience he had never known

or heard of an accident happening in the way the plaintiff was injured, either before or since the accident.

The plaintiff introduced one W. H. H. Allen, who testified that he had resided in Washington seventeen years; that he had been a railroad contractor for twenty-six years; that he had done general construction of railroads; that his firm of Talty & Allen constructed the City and Suburban road and built the crossing in question; that it corresponded with the general and usual way of constructing planking crossings across electric railways. That it was the standard way of putting in crossings; that the distance between the inside of the rail and the planking according to standard construction on street railways is about 2⅛ inches; that on steam railways it is about 2¼ or 2½, because the wheels have a little more tread; that the space is left for the purpose of guarding against the danger of derailment; that in his experience he had supervised the construction of a great many crossings; that he had been on construction work for forty-odd years.

The defendant also introduced as a witness Harry W. Fuller, who testified that he was general manager of the Washington Railway and Electric Company, and had been since February, 1901; that he was in Jersey City with the North Jersey roads for seven years; that he had been in the street railway business since September, 1891; that he had a broad general knowledge of what is considered good practice in railroad construction; that in constructing plank crossings across street railroads the space left between the planking and the inside of the rail for flange space is from 2 to 2½ inches; that as far as his knowledge and observation went that the usual thickness of the flange that runs in the groove is 15-16 of an inch. On cross-examination he said that the flange tapered toward the outer rim; that he gave the thickness of the heaviest part of the flange; that the flange at a level with the surface of the rail was ¾ of an inch and tapered to practically nothing.

The defendant also introduced as a witness George W. De Rene, who testified that he had been roadmaster on the Washington Railway and Electric Company for five years. That he had supervision of the road department, road beds, and overhead construction and everything pertaining to that department; that he was familiar with the usual construction of plank crossings over suburban roads; that he had had twenty years' experience in constructing railroads; that he was familiar with the plank crossing where the accident happened; that the crossing was the regular standard crossing that is put in all over the country on electric roads, that there is a universal standard of space left between the inner side of the rail and the planking; that it was between 2 and 2¼ inches; that the trackman's gauge of a crossing is the width of three fingers past the first joint; that this is the universal gauge throughout the United States.

The plaintiff offered no evidence in rebuttal upon the subject of the proper construction of the crossing, but Mr. Lewin testified that two or three days after the accident he looked at the crossing where the accident happened and at two crossings in Hyattsville; that at the two last named the space between the rail and the plank was simply of the necessary depth for the flange; that he did not know whether those were plank crossings, and did not know what was under the earth fillings, but just inside the rails there was a board; that at the place where the accident happened it was entirely different—just the raw edge of the board. But it appeared that the two crossings in Hyattsville are crossed by carriages, which would account for the gravel filling in the space. And the defendant proved by Mr. Mersheimer that it was customary to have men go along constantly and clean these places out where they were filled up with earth.

The plaintiff was recalled in rebuttal and testified that he had not been in the habit of going on the track before he was hurt and standing there when the cars were coming;

that he never stood there when the car was coming until it got near him and then jump off; that he never saw any of his brothers do that, but that he saw a boy named Richard Garrison stand there until the car got right close to him, and then he would jump off; that that was before he was hurt; that he saw him hopping the cars there lots of times.

Upon this state of the evidence the defendant's counsel prayed the court to instruct the jury to return a verdict for the defendant, but the court denied the prayer and the defendant's counsel excepted (Rec. p. 38).

Thereupon the plaintiff's counsel requested the court to give the jury two instructions, as follows:

> "1. The jury are instructed that if they find upon consideration of all the evidence in the case that the plaintiff's foot was caught in the space between the planking and the rail at the crossing referred to in the evidence, so that he was unable to extricate his foot therefrom, they should render a verdict for the plaintiff if they find that leaving the opening in the condition in which it was when the plaintiff's foot was so caught therein was not a reasonably safe method of maintaining the crossing, or that by the exercise of reasonable diligence on the part of the motorman who had charge of the car which injured the plaintiff he could have stopped the car before it reached the plaintiff.
>
> "In considering the question of the liability of the defendant on either of the two foregoing grounds the jury are instructed that they have a right to take into consideration the evidence tending to show that the place where the accident occurred was a public crossing and that it was frequented, and was known to the motorman in charge of the car to be frequented, by young children as well as by older persons.
>
> "2. The jury are instructed that if they find a verdict for the plaintiff they should render a verdict in his favor for such sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the

pain resulting from the injury, and from the loss of his leg; for the inconvenience to which he has been put, and which he will be likely to be put during the remainder of his life in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss as the direct cause of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs" (Rec. p. 38).

The defendant's counsel objected separately to the giving of said instructions, and each of them, but the court overruled said objections and gave said instructions to the jury, and the defendant's counsel excepted separately to each ruling (Rec. pp. 38–9). Thereupon the defendant's counsel moved the court to grant five several instructions to the jury, separately, as follows:

"2. If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to commence to stop the car until such time as he discovered that the plaintiff had his foot caught between the rail and plank; and if they shall further find that as soon as the motorman made such discovery he did all in his power to stop the car before it struck the plaintiff, then they should find for the defendant.

"3. If the jury shall find from the evidence that the crossing or platform at the place where the accident happened was constructed in the usual and ordinary way of constructing such crossings in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere

to the knowledge of the defendant's officers or agents, and that a reasonably prudent man would not have anticipated such an accident from such construction, then the verdict should be for the defendant. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated.

"4. If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had ample time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to commence to stop the car until such time as he discovered that the plaintiff had his foot caught between the rail and the plank, and that as soon as the motorman made such discovery he did all in his power to stop the car before it struck the plaintiff; and if the jury shall further find from the evidence that the crossing or platform at the place where the accident happened was constructed in the ordinary and usual way of constructing such crossing in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the officers or agents of the defendant, and that a reasonably prudent man would not have anticipated such an accident from such construction, then the verdict should be for the defendant. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated.

"5. If the jury shall find from the evidence that the crossing or platform at the place where the accident happened was constructed in the usual and

ordinary way of constructing such crossings in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the defendant's officers or agents, and that a reasonably prudent man would not have anticipated such an accident from such construction, then they should not find the defendant guilty of negligent construction, and the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident, and not afterwards, and the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated.

"6. If the jury find from the evidence that the motorman sounded the gong when he was far enough away from the plaintiff and his associates, so that they had sufficient time to leave the track before the car reached them; and if they shall further find that as soon as the motorman saw that the plaintiff probably would not or could not leave the track before the car reached him, he did all in his power to stop the car before it struck the plaintiff, and shall further find that the construction was not negligent, then they should find for the defendant; and in determining whether the motorman should have commenced to stop the car before he did they may consider the fact, if they find it to be a fact from the evidence, that plaintiff and others were in the habit of standing on the track and leaving it as the car approached near them, and whether he saw any waving from any one before he commenced to stop the car."

But the court denied each of said motions separately, and the counsel for defendant excepted separately to each of said rulings (Rec. pp. 39, 40, and 41).

Assignment of Errors.

The court erred:

1st. In refusing to direct a verdict for the defendant.

2d. In granting the instruction for the plaintiff numbered one.

3d. In granting the instruction for the plaintiff numbered two.

4th. In refusing to grant the instruction asked for defendant numbered two.

5th. In refusing to grant the instruction asked for defendant numbered three.

6th. In refusing to grant the instruction asked for defendant numbered four.

7th. In refusing to grant the instruction asked for defendant numbered five.

8th. In refusing to grant the instruction asked for defendant numbered six.

The foregoing assignments of error give rise to the following points:

(*a*) There was not sufficient evidence to justify the submission of the question of negligent construction to the jury.

(*b*) If the question of negligent construction was proper for the consideration of the jury under the evidence, they should have been instructed that ordinary and usual construction is not negligent construction, if a reasonably prudent man would have adopted it.

(*c*) There was not sufficient evidence to justify the submission of the question of the alleged negligence of the motorman to the jury.

(*d*) If the question of the alleged negligence of the motorman was proper for the consideration of the jury under the

evidence, they should have been instructed that if he sounded his gong when far enough away from the plaintiff to enable him to leave the track in safety, he had the right to assume that he would do so, and that it was not his duty to commence to stop the car until he discovered something to indicate, to a reasonably prudent man, that he probably would not or could not do so, and that if after making such discovery he did all in his power to stop the car, he was not guilty of negligence.

(*e*) The jury should not have been permitted to consider future mental suffering in enhancement of damages.

(*f*) The jury should not have been permitted to consider future pecuniary loss to the plaintiff by being deprived of his leg.

A and B.

These two points present the question of THE DUTY OF THE DEFENDANT AS TO CONSTRUCTION.

The evidence introduced in behalf of defendant showed that the construction in question was the ordinary and usual construction in such cases in this District and elsewhere, and had been in use for years, and that no accident had been known to the officers, agents, or employees of the defendant to have occurred therefrom, except the one mentioned in this case. A reasonably prudent man would not have anticipated an accident from such construction.

THE DUTY OF THE DEFENDANT WAS PROPERLY DISCHARGED BY THE ADOPTION OF USUAL AND ORDINARY CONSTRUCTION WHERE, AS IN THIS CASE, THERE WAS NOTHING TO SUGGEST DANGER.

This is the general rule in all cases, except possibly where the relation of passenger and carrier exists between the plaintiff and defendant. It has been applied by this court as between employer and employee, and certainly the defendant in this case owed the plaintiff no greater duty than an employer owes its employees to furnish a safe

place, implements, and machinery. The following cases support this rule, and in some of the cases the relation of passenger and carrier existed between the parties.

Asphalt Co. *vs.* Mackey, 15 D. C. App. 410.
Wabash, etc., R. R. Co. *vs.* Locke, 112 Ind. 404.
Dougan *vs.* Champlain Trans. Co., 56 N. Y. 1.
Crocheron *vs.* U. S., etc., Ferry Co., 56 N. Y. 656.
Cleveland *vs.* N. J. Steamboat Co., 68 N. Y. 306.
Loftus *vs.* Union Ferry Co., 84 N. Y. 455.
Burke *vs.* Witherbee, 98 N. Y. 562.
Laflin *vs.* B. & O. R. R. Co., 106 N. Y. 136.
Fahner *vs.* Brooklyn Heights R. R. Co., 83 N. Y. Supp. 815.
C. B. & Q. R. R. Co. *vs.* Stumps, 55 Ill. 367.
Nitro Glycerine Case, 15 Wall, 524.
Charnock *vs.* Tex. & Pac. Ry. Co., 194 U. S. 433.
Morrissey *vs.* Eastern R. R. Co., 126 Mass. 377.
B. & O. R. R. Co. *vs.* Schwindling, 101 Pa. St. 258.

In the case of Asphalt Company *vs.* Mackey, 15th D. C. App. Cas. 410, the action was by the administrator of a man who was killed while in the employ of the asphalt company, unloading broken stone from a scow, by being struck by the iron handle of a bucket which was used in unloading the stone, and it was alleged in one count of the declaration that it fell on account of improper construction.

In the statement of the case by Chief Justice Alvey, on page 415 of the report, it is said:

> "The declaration contains two counts; the first alleging that the defendant used in and about its work, wherein the said Martin was employed as a laborer, a certain piece of machinery and appliances attached thereto, in bad and insufficient repair, whereby death was caused; and the second count alleging that said machine and appliances used therewith was of insufficient construction for the purpose intended, and that other and better contrivances

could have been adopted and used by the defendant for the purpose aforesaid; but the defendant negligently omitted the use of such other appliances."

On page 420 of the report, the chief justice recites the testimony of a witness who was a machinist and who was called to prove that the handle of the bucket was improperly constructed, and he so testified, and pointed out wherein a safer construction might have been adopted, but he also testified that—

> "*The buckets of that type have been in use a number of years to his knowledge, but he did not know how many years, or when they were invented, but it must have been a good many years that they have been in use.*"
>
> See report, p. 421.

The case was submitted by the court below to the jury upon both counts of the declaration; and while this court held that it was not error to submit the case upon the first count, it held that it was error to submit it upon the second count. In the opinion, the chief justice uses this language:

> "But while there was some evidence to be submitted to the jury on the first count of the declaration, there was absolutely no legal or competent evidence tending to support the allegations of the second count that the latch or contrivance for holding the handle of the tub or bucket in its upright position, for the purposes for which said bucket was used, and that a better contrivance could have been adopted and used by the defendant for the purpose aforesaid, but which the defendant neglected to adopt and use" (see report, p. 422).

Referring to the same subject later in the opinion, the chief justice said:

> "But with respect to the second count of the declaration, as there was no proof legally competent to

entitle the plaintiff to recover under that count, the prayer of the defendant that the jury be instructed that on the second count of the plaintiff's declaration he was not entitled to recover, and on that count the verdict should be for the defendant, on the ground that no cause of action was shown by said count, and that the evidence was insufficient to sustain a verdict for the plaintiff on said count, should have been granted" (see report, p. 423).

On page 424 of the report the chief justice quotes a paragraph from the charge of the court below, which was held to be error. The quotation is as follows:

> "That it is the duty of the defendant in furnishing this machinery to employees to furnish them with machinery that was so constructed and planned as would make it reasonably safe to be used and handled by the employees, and it should have been such machinery and so regulated and planned as persons exercising ordinary care and prudence would plan and regulate in furnishing such machinery for the use of their employees. About that the jury has heard the testimony. They have seen the model produced here and have heard the testimony and explanations of the witnesses. They have heard the testimony in regard to how the accident occurred, what position the parties were in at the time, and it is for the jury to say from the evidence, taking the evidence and giving it careful consideration, what relation, if any, the lack of the proper construction of this machinery had with the occurrence of this accident" (see report, p. 424).

Commenting upon this instruction, the court said:

> "By the instruction given, the jury were allowed to speculate and determine at will what plan and construction of machinery should have been employed by the defendant in the execution of its work, with a view to the safety of its employees. The question submitted to the jury by this instruction was not whether the latch appliance affixed for keeping

the handle of the bucket in position was in good or bad repair, or if in bad repair whether it was safe to those employed in operating it. It was permissible to the jury, under this instruction, to conclude, and they may have so determined, that the latch or trigger for supporting the handle of the bucket was of improper construction, and that some better contrivance could and ought to have been used. It is not pretended, however, that the bucket and its appliance, and mode of operation, constituted any novel and untried piece of machinery, in the operation of which there was any apparent ground for the apprehension of danger. *On the contrary, it is shown by the proof that this bucket, with the particular appliance for operation, has been in use, not only by the defendant, but by others, for several years, and that it has been regarded as entirely safe.* It is true, when the conduct of a party as an employer, using machinery in his work, amounts to negligence to the damage of his employees, in failing to keep his machinery or appliances in safe repair and operative condition, the law holds him responsible; *but his responsibility can not be made to depend upon the varying notions or opinions of juries as to what kind of structure of machinery he should use in his work.* Such a principle, if sustained, would tend to embarrass all the industries of the country that are carried on by machinery, the most of which is attended with more or less danger to those operating the machinery" (see report, pp. 424–5).

The last pargraph of the opinion contains a quotation from a Pennsylvania case, in the following language:

> "They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances *is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man.* The test of negligence in employers is the same, and however strongly they may be convinced that there is a better

> or less dangerous way, *no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they can not be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community*" (see report, p. 426).

It will be observed that the two first sentences in this last quotation are a general statement of the principle as applied to all persons, and the residue of the quotation applies that principle to employees. The italics in the above quotations are ours. It is submitted that this case shows that the court below should have informed the jury that there was no sufficient evidence of negligent construction. There was in the Asphalt Co. case evidence introduced by the plaintiff tending to show that there was a safer way of constructing the handle, but the court held that it should not have been submitted to the jury, because there was no conflict in the evidence upon the point that it was *usual* construction. In our case there was no evidence tending to show a better or safer method of construction, while the evidence was conclusive that the construction complained of was the ordinary and customary one.

In the case of the Wabash, St. L. & Pac. Ry. Co. *vs.* Locke, Admr., 112 Ind. 404, the injury was caused by the sagging of a wire which caught a brakeman of defendant and was consequently broken. In falling it twined around plaintiff's intestate, who was on the right of way by permission of defendant unloading a car, and dragged him, thereby inflicting injuries from which he died. Copious extracts are made from the opinion in this case, because it seems to have been thoroughly considered, and many cases are cited in support of its conclusions.

In reversing judgment for plaintiff, the court said:

> "Where, however, an action is predicated upon an injury resulting from an act or omission which

could only become tortious on account of the relations which the parties sustained to each other, and where the very substance of the wrong complained of itself was the failure to act with due care and foresight, then the right of action depends primarily upon so fixing the relation of the parties as to show the defendant's obligation, and upon showing further that the harm and injury complained of was such as a reasonable man in the defendant's place should have foreseen and provided against.

"In such a case it is not enough to show that an accident happened, and that death or injury resulted therefrom. Negligence is not to be presumed *from the fact of an occurrence like that involved in the present case, the statement of which suggests its anomalous, exceptional, and extraordinary character.* . . . The obligation of the railway company did not, however, require it to make the place absolutely safe. It was not required to make accidents impossible. Its duty was not to allow its depot and grounds, to and upon which people were invited to come, to become more dangerous than such a place would reasonably be, having regard for the necessities of its business and the nature of the contrivances necessarily employed in carrying it on.

"The case, therefore, stands upon a different footing from the cases which involve the duties of carriers who contract to carry passengers safely to a particular destination. In such cases proof of an injury ordinarily establishes a prima facie case of negligence in favor of a passenger which the carrier must overcome (citing authorities).

"Where, as in the case under consideration, the obligation is not in its nature so nearly absolute, and the circumstances of the accident suggest, at first blush, that it may have been unavoidable, notwithstanding ordinary care, the plaintiff charging negligence assumes the burden of proving that the defendant has, by some act or omission, violated a duty incumbent on it, from which the injury followed in natural sequence (citing authorities).

"Taking the admitted or established facts, and those most favorable to the plaintiff, and the inquiry

in the present case must be, does it appear, or can it be inferred, that the railroad company failed to observe such precaution for the safety of the plaintiff's decedent, and others similarly situate, as ordinarily regulates the conduct of reasonable men? Or can it be inferred from the evidence that reasonable men engaged in like business would have anticipated and provided against the accident which happened? If no such inference could properly have been drawn, then there was no wrong; the company was not negligent, and there is no liability. . . .

"Mischief, which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, can not be taken into account as a basis upon which to predicate a wrong. 'Now a reasonable man,' says a recent learned author, 'can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. *The reasonable man then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precautions by the measure of what appears likely in the known course of things* (citing authorities).

"The proper inquiry is not whether the accident might have been avoided if the company had anticipated its occurrence, but whether, taking the circumstances as they then existed, the company was negligent in failing to anticipate and provide against the occurrence (citing cases).

"The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor that the company should have employed any particular means which it may appear after the accident would have avoided it. It was only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident (citing cases).

"In Sjogren *vs.* Hall, 53 Mich. 274, the plaintiff, by some accident not explained, lost his leg by being

caught in a wheel connected with the operation of a sawmill in which he was employed. The plaintiff claimed that the defendant was negligent in leaving the wheel uncovered, and that at a very small expense the accident could have been prevented. Cooley, J., delivering the opinion of the court, said: 'If the accident which occurred was one at all likely to happen—if it was a probable consequence of a person working about the wheel that he would be caught in it as plaintiff was—there would be ground for pressing this argument. But the accident can not be said to be one which even a prudent man would have been likely to anticipate. . . . So far as there is a duty resting upon the proprietor in any of these cases, it is a duty to guard against probable dangers; and it does not go to the extent of requiring him to render accidental injuries impossible' (citing cases).

. . . . . .

"Crafter *vs.* Metropolitan R. W. Co., L. R., 1 C. P. 300, was a suit to recover for injury occasioned by the plaintiff falling on a stairway, which the defendant's duty required it to keep in a safe condition. The cause of the slipping was that the brass nosing of the stairs had been worn smooth by travel over it, and a builder testified that in his opinion the staircase was unsafe on account of the smooth condition of the nosing and the absence of a handrail. There was nothing to contradict this, except that great numbers of persons had passed over the stairs, and that no accident had ever happened before. Setting aside a verdict for the plaintiff, the court held there was no evidence of negligence (citing authorities).

"These cases, to a greater or less extent at least, go upon the theory that persons who are charged with a duty in relation to a particular matter or thing have a right to rely upon the sufficiency of a structure or contrivance, *such as is in common use for the purpose*, and which has been in fact safely used under such a variety of conditions as to demonstrate its fitness for the purpose. When a structure or

appliance, such as is in general use, has uniformly answered the purpose for which it was designed and used, under every condition supposed to be possible in the business, it can not in reason be said that a person has not acted with ordinary prudence and sagacity in not anticipating an accident which afterwards happens in the use of the thing, notwithstanding it continued substantially in the same condition all the time."

In the case of Dougan *vs.* Champlain Transportation Co., 56 N. Y. 1, the plaintiff's intestate, a passenger, slipped under the gangway rail of a steamboat, fell overboard and was drowned; and it appeared that all the boats upon Lake Champlain were constructed in the same manner; that they had been so run for many years, and there was no proof tending to show that anyone had ever before gone overboard in that way. It was held that the plaintiff was properly non-suited. Grover, J., writing the opinion, said:

"It will be seen that the only proof of negligence was the omission to enclose the space between the railing and deck so as to preclude the possibility of slipping under it. Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury. But the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect; that boats had so been run for a great number of years, and there was no proof tending to show that anyone had ever before fallen and gone overboard under the railing, or that any such danger had been apprehended by anyone. It is obvious that no such thing was likely to occur."

In Crocheron *vs.* North Shore Staten Island Ferry Co., 56 N. Y. 656, the case was as follows:

"Plaintiff was a passenger upon one of defendant's boats. Upon each step of the main stairway of the boat was put a brass plate or covering, which was

corrugated, save where it turned over the edge of the step. This was left smooth and slippery. Plaintiff's evidence tended to show that she slipped on the edge of the step, as she was passing down the stairway to leave the boat, and was injured. The placing of this plate upon the stair was the alleged negligence. The stairs were finished in the same manner as upon the best river boats and upon American sea-going steamers. The boat had been in use a year and had carried, on an average, a thousand passengers a day. No injury of the kind had before occurred. Several experienced men testified that this mode of covering stairs was the best in use. Held, that the evidence failed to show negligence, and that a refusal to non-suit plaintiff was error."

There was no opinion except as above.

In the case of Cleveland *vs.* N. J. Steamboat Co., 68 N. Y. 306, the plaintiff went on board of defendant's steamboat to take passage to Albany. Defendant had provided a gate to close the gangway opening, the top bar of which projected at each end. The projecting ends of this bar, when the gate was in its place, rested in iron staples at each end of the opening to prevent the gate from swinging, and there were two upright stanchions placed outside the gate let into the deck. There was also a top rail which received the stanchions and which, when in place, was secured by iron slides. The gate had been put in place before the boat left the wharf. As the boat moved out persons on board attempted to jump ashore, but fell into the water. This caused a sudden rush of a crowd of passengers to the side. Plaintiff was pushed against the gate. The gate gave way under the pressure and plaintiff fell overboard. The court, in reversing a judgment for the plaintiff, said:

"The more important question is whether the defendant is chargeable with negligence causing the mishap to the plaintiff.

"The plaintiff went onto the boat for the purpose of taking passage on that trip, and though he had

not yet procured a ticket, he was, if he remained on board, liable for the payment of the passage money. He was there in the character and relation of a passenger. The defendant owed him the duty of a carrier of passengers to a person in its charge as such. That duty is, to use the strictest diligence to protect the life and person. By this rule the defendant is liable for any injury which might reasonably be anticipated to occur, in view of all the circumstances, and of the nature of the carriage and the number and character of the persons upon the boat (citing authorities). This broad statement has limits. A carrier of passengers is not bound to foresee and provide against casualties never before known and not reasonably to be expected (citing authorities). Hence his duty is not to be estimated by what, after an accident, then first appears to be a proper precaution against a recurrence of it. . . .

"If it be conceded that the occurrence of just the same thing again would be an act of negligence, it is still to be ascertained whether it was one which on that or any other evening was then reasonably to be anticipated, and which defendant ought to have expected as liable to take place in the natural course of things."

As tending to show that such an accident was not reasonably to be anticipated, the court at page 313 of the report lays stress upon the fact that none had happened before, in the following language:

> "*It had not been known so to occur before, and we do not think it can be said that it was reasonably and naturally to be looked for as liable to take place then. The case is without a syllable of proof that such an accident ever happened before, or that any one of the constituents of it ever happened before. . . . We see no facts in proof, from which it can be said that such an occurrence was reasonably to be anticipated, or that it was or should have been contemplated by the defendant as in the nature of things likely to occur.*"

In Loftus *vs.* Union Ferry Co., 84 N. Y. 455, the plaintiff's

intestate, a child 6 years old, while leaving one of the defendant's boats, fell through one of the openings in the guard rails into the water and was drowned. The plaintiff recovered, and it was held that the verdict was properly set aside. Andrews, J., writing the opinion of the court, said:

> "The law does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet with no casualty in the use of appliances provided for it. *It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened, and this, so far as appears, could have been done without unreasonable expense or trouble.* If the defendant ought to have foreseen that such an accident might happen, or that such an accident could have reasonably been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. *The company had the experience of years certifying to the sufficiency of the guard.* That it was possible for a child, even a man, to get through the opening was apparent enough. But that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty."

In the case of Burke *vs.* Witherbee et al., 98 N. Y. 562, defendants owned and worked an iron mine. The ore was taken out of the mine upon cars drawn upon a track by a cable, to which the car was attached by a hook. Two cars were used, one of which was loaded while the other was being drawn out, and on return of the empty car the hook was shifted to the loaded ones. As an empty car was descending, the hook in some way became detached and plaintiff's intestate was struck and killed by the car. In an action to recover damages it appeared that in other mines as well as in this where two cars were thus operated the hook was always used on account of the facility with which it could be changed from one car to another. It had been used in

this mine over a year, night and day, without the happening of any previous accident of the kind. Held, that the evidence did not justify an inference of negligence on the part of the defendants, and that a refusal to non-suit was error.

There were a verdict and judgment for the plaintiff below.

In delivering the opinion, holding that the case should not have been submitted to the jury, the court said:

> "It seems to us quite inadmissible, if not preposterous, to attribute negligence to a mine owner for using an implement which had been employed in different mines and which under varying conditions upon countless occasions uniformly answered its purpose without injury to any one (Titus *vs.* Union Ferry Co., 84 N. Y. 455).
>
> "It is a mistake for one to take his stand after an accident and to impute responsibility from a view thus obtained. It is nearly always easy after an accident has happened to see how it could have been avoided. But taking our stand before this accident, the very first of the kind, so far as we know, that ever occurred, we can, upon the facts of this case, see no ground for imputing against the defendants the want of that ordinary care, diligence and foresight which they, as employers, owed to the men in their service."

In the case of Laflin *vs.* B. & S. R. R. Co., 106 N. Y. 136, the action was brought to recover damages for injuries sustained by the plaintiff in alighting from one of the defendant's cars, and the circumstances of the accident were that the train in which she was a passenger reached the station at Dayton, at 8 o'clock in the evening, and she left the car for the purpose of changing to another train at that place, and in her effort to step from the car to the station platform, she fell between it and the car, and sustained the injuries of which she complains. She alleged that the space between the platform and the car was too great, and that in

consequence thereof, when she stepped off the car, she failed to reach the platform and was thus caused to fall.

Amongst other things the court, in its opinion, said:

> "There was no proof that the platform was not constructed in the ordinary way, nor that the space between it and the car was any greater than the exigencies of the business and the operations of the railroad required. There was no evidence that any accident had ever happened at that station before on account of the construction of the platform, or that there had ever been any complaint in reference to it. On the contrary, the evidence shows that the platform had been used for many years by men, women and children, and that no one but the plaintiff had ever been injured or had suffered any inconvenience on account of the distance of the platform from the cars. Thousands of men, women, and children must have passed from the cars to this platform in entire safety. Under such circumstances how can it be properly said that the defendant was guilty of any carelessness in its construction and maintenance? It was not bound to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient and useful. It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it was devoted. *In the case of a platform which had always been safe, and answered its purpose for men, women, and children, in all kinds of weather, by night and by day, for many years, what was there to suggest to any prudent person any change or improvement for the purpose of making it more safe or convenient?*"

After citing and quoting from some of the cases referred to in this brief, the court said:

> "The application of these authorities to his case is quite obvious. No structure is ever so made that it may not be made safer. But as a general rule, when an appliance or machine or structure, not obviously dangerous, has been in daily use for years,

> and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness."

There were a verdict and judgment for plaintiff below, which were reversed and a new trial ordered.

Fahner *vs.* Brooklyn Heights Co., 83 N. Y. Supp. 815:

Plaintiff, in passing out of the station of defendant's elevated railroad to take his car, was obliged to pass through a doorway in which defendant maintained two swinging doors. A passenger preceded him, and permitted one of the doors to fly back in his face. To avoid injury he threw up his arm, which passed through the glass panel on the door, cutting him seriously.

The court said:

> "It thus appears from the undisputed evidence in this case that the defendant has used glass in its doors of the same kind that was in the door where the plaintiff was hurt for a series of years, and that this use was general over its system where glass of the same size was used, and that the witness, who was in a position to know of these accidents, because he was called upon to make the repairs, in a period of eight years had never heard of any person or passengers being injured by the breaking of one of these glasses. He had known of their being broken by the action of the wind, and this appears to have been the only thing which their experience had warranted them in guarding against. This, it seems to us, brings the case within the rule so often asserted, that a carrier of passengers is not bound to foresee and provide against casualties never before known and not reasonably to be expected, and that his duty is not to be estimated by what, after an accident, then first appears to be a proper precaution against a recurrence of it; and it has been held that this rule is not confined to common carriers, but is applicable generally to negligence cases. Dwyer *vs.* Hills Bros. Co., 79 App. Div. 45, 46, 79 N. Y. Supp. 785, and

authorities there cited. As a general rule, when an appliance or machine or structure not obviously dangerous has been in daily use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness. Laflin *vs.* Buffalo S. W. R. Co., 106 N. Y. 136, 141, 12 N. E. 599, 60 Am. Rep. 433. In the absence of any evidence that any one had ever been injured by the use of double-thick window glass under the circumstances disclosed by the evidence, and where the evidence is undisputed that similar glass had been used in the door where the injury occurred for two years, and upon the defendant's railroad system generally for a number of years, and that for a period of eight years one in a position to hear of such an accident, if it had occurred, had never learned of such a case, it would seem that it was error to permit the jury to speculate upon the question of the defendant's negligence. The case is well within the rule that where an accident is not the reasonable, natural, and probable result of the situation, which ought to have been foreseen by the defendant in the exercise of the degree of care exacted from a carrier of passengers, no liability follows. Ayers *vs.* Rochester Railway Co., 156 N. Y. 104, 108, 50 N. E. 960, and authorities there cited."

In the case of C. B. & Q. R. R. Co. *vs.* Stumps, 55 Ill. 367 it was said by the court:

"When an accident has once occurred, because it is seen after the event that the use of a particular precaution would have effectually prevented it, that does not show that it was the duty of the appellants beforehand, to have adopted that precaution. Their duty was to have used every reasonable precaution and not every absolute necessary precaution to avoid injury to individuals.

"The question is rather, what would have been the course of a very prudent person prior to the accident; whether he would have thought exposure to injury from such cause such a probable source of danger

> as to have required the adoption of any further precautions and safeguards than those used to protect against it (citing cases)."

In the Nitro-Glycerine case, 15 Wall. 524, where there was injury to the property of the plaintiff, by the explosion of a box of nitro-glycerine, while in the custody of a common carrier, for transportation, and it was claimed that the defendant was guilty of negligence in handling it, while the box was in a leaky condition, which, it was contended, was sufficient to put the defendant upon notice of its dangerous condition, the Supreme Court, at pages 536–7, said:

> "'Negligence' has been defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. *It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.*"

In the case of Charnock *vs.* Tex. & Pac. Ry. Co., 194 U. S. 433, the Supreme Court recognized and applied the doctrine we are contending for. That was a suit against the railroad company to recover the value of property destroyed by fire through the alleged negligence of the railroad company. The property destroyed was cotton, which was loaded by the owners upon cars furnished by the company on a switch at Meekers, which was not a regular station on the road, but the company had been accustomed to furnishing cars on the switch at the request of the shippers, and after

they were loaded moving the cars out by the first freight train passing after the loading was completed. The cotton in question was loaded in the afternoon and the first train that would pass thereafter was 9 o'clock the next morning. During the night the cotton aboard the cars was destroyed by fire. There was no agent maintained at the station. The allegation of negligence was that the cotton was left by the company in the cars standing upon the track in the open country unguarded and unwatched in any particular whatever. That it was the duty of the company to protect the cars and cotton from depredation, loss, or injury by third persons or wrong-doers. The Supreme Court, in sustaining the action of the trial court in directing a verdict for the defendant, said :

> "Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances. Applying that test in the case at bar we do not think negligence on the part of the defendant was established."

Where the plaintiff is in a railway station or upon a platform for pleasure or curiosity and is injured by a defect therein, there can be no recovery. Under such circumstances the railroad company owes the party no duty of diligence, but only the negative duty not to intentionally injure.

Redigan *vs.* Boston & Maine R. R., 155 Mass. 44.

The plaintiff was injured by falling into an open trap door in the platform of the station as she was passing over it from one street to another. The court, in its opinion, describes the situation as follows :

> "The railroad station at which the accident happened is so situated that its grounds upon the west and south are contiguous to public streets, Prescott street on the west and Lincoln Square on the south. The grounds are unenclosed, and their surface is of

substantially the same level and appearance with the streets, so that no line of demarcation is apparent. The station building is surrounded by a platform elevated one step above the ground, and the platform continues southerly along the railroad track to Lincoln Square. In the other direction, the platform is distant at its northwest corner about twenty-five feet from the easterly line of the other street. The surface of the station grounds between the streets and the platform was in a suitable condition for public travel, and was very much used by teams and foot passengers in going to and from the station, and in traveling across the station grounds from one street to the other. There was no sidewalk or other defined foot path on the east side of Prescott street next to the station grounds, but there was a brick sidewalk on the west side of Prescott street extending to Lincoln Square. There was a path trodden by foot passengers extending diagonally across Prescott street and the northerly portion of the open station grounds towards the northwest corner of the platform. The route by this path and the platform on the west and south sides of the station building, and thence southerly by the platform next the tracks between the northerly part of Prescott street and the square at the end of the platform, was a hundred or more feet shorter than that by the public streets. A large number of persons not passengers or having business at the station went over the platform daily, in passing by this short cut from one street to the other. There was no evidence whether the defendant made any attempt to prevent this travel, and none that it permitted it except that it existed in fact. There was also evidence that many people went over the platform on the east side of the station, and some along or between the railroad tracks, when going to Lincoln Square from points northerly of the station." . . .

After holding that the plaintiff was a licensee, the court proceeds:

"The general rule is, that a bare licensee has no

> cause of action on account of dangers existing in the place he is permitted to enter, but goes there at his own risk, and must take the premises as he finds them. Reardon *vs.* Thompson, 149 Mass. 267; Parker *vs.* Portland Publishing Co., 69 Maine, 173. No duty is cast upon the owner to take care of the licensee, or to see that he does not go to a dangerous place, but he must take his permission with its concomitant conditions and perils, and can not recover for injuries caused by obstructions or pitfalls. Hounsell *vs.* Smyth, 7 C. B. (N. S.) 731; Batchelor *vs.* Fortescue, 11 Q. B. D. 474; Sweeny *vs.* Old Colony & Newport Railroad, 10 Allen, 368, 372. 'An open hole, which is not concealed otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril.' Holmes, J., in Reardon *vs.* Thompson, 149 Mass. 267, 268; Sullivan *vs.* Waters, 14 Ir. C. L. 460, 475."

In Gillis *vs.* Pa. R. R. Co., 59 Pa. St. 129, plaintiff was one of a crowd that had collected on the platform at defendant's station for the purpose of seeing a President of the United States, who was traveling over defendant's road. The platform gave away, thereby causing the injuries complained of.

> "By court, Sharswood, J. The platform of a railroad company at its station or stopping place is in no sense a public highway. There is no dedication to public use as such. It is a structure erected expressly for the accommodation of passengers arriving and departing in the train. Being uninclosed, persons are allowed the privilege of walking over it for other purposes, but they have no legal right to do so. The servants of the company, after requesting them to leave, can remove them by whatever force may be necessary."

After holding that a railroad company is not liable for negligence to a trespasser, but only for wilful injury, and citing authorities in support thereof, the court added:

> "The application of this principle to the determi-

nation of the case in hand is not difficult. The plaintiff may not have been technically a trespasser. The platform was open; there was a general license to pass over it. But he was where he had no legal right to be. His presence there was in no way connected with the purpose for which the platform was constructed. Had it been the hour for the arrival or departure of a train, and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by the authority of the defendants, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who could stand on it. As to all others, they were liable only for wanton or intentional injury. *The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity or to give vent to his patriotic feelings.*" . . .

"However much to be lamented was the sad occurrence which occasioned this suit, and however much sympathy may be felt for those who were injured, and the families of those who lost their lives, we are of the opinion that the circumstances of the case were not such as to cast any pecuniary responsibility on the railroad company, and that the learned judge below was therefore right in directing the jury to find a verdict for the defendants."

The case of Burbank *vs.* Ills. C. R. R. Co., 42 La. Ann. 1156, was a suit for damages for injuries received by the plaintiff by falling through a hole in the platform of the defendant's station, whither she had gone to be present on the arrival of a passenger train.

The court, delivering the opinion, said:

"She was at the depot, it is true, by a general license from the company, in the absence of any express prohibition. It would not be practical for a railroad company, in the immensity of its business,

to designate particular individuals who should be permitted to enter its depot. But there was no express or implied invitation to the plaintiff to go to the depot and on the platform." . . .

"From the evidence in the record we think the fact is clearly established that the plaintiff was on the platform for pleasure only, and not with the intention of transacting any business with the company, or for the purpose of receiving friends expected on the train." . . .

"Railroad platforms are not made for the use of the public; and if persons not invited and having no business with the company are injured in consequence of a defect in the platform, they have no redress. Wharton, Negligence, paragraph 822.

"There was no inducement offered by the defendant to plaintiff which was equivalent to an invitation to go upon the platform. Mere permission, because it is impossible to refuse it, is not an inducement or an invitation to enter on the premises of another. The person entering on the premises of another under such circumstances goes at his own risk, and enjoys the license subject to its attendant perils. The law does not impose the duty upon the owner to keep his premises in a condition of such repair as to suit the convenience of those who go there solely for their own pleasure, and who are not invited or induced to go upon them.

"The defendant company, under the facts in this case, could only be made liable if the uncovered platform through which the plaintiff fell was in its nature a trap. Wharton, Negligence, paragraph 821.

"There must have been on the part of the company such gross and wanton negligence that it was equivalent to intentional mischief. Snyder *vs.* Railroad Co., 42 An. 302."

In that case the plaintiff claimed that she had gone to the train to meet guests, but the court found that she was there for pleasure. While the presence of the plaintiff and his brothers on the platform and crossing is attempted to be accounted for by alleging that they had gone there to meet

their parents, it is manifest that this is a mere pretext. It does not appear that the boys knew what time their parents would arrive, and it appears that their house was near enough to the platform so that they could have gone to it after they could have seen a car approaching from Washington. It also appears that their house was on the eastern side of the track and even if they were waiting near the platform for a car to arrive from Washington there was no occasion for them to cross the tracks until they saw one approaching from that direction, and the evidence shows that there was none at the time in sight, although one could have been seen for 500 feet or more. Besides the evidence shows that they had been playing about the platform for an hour or more. They were undoubtedly there for pleasure and not to meet their parents. While the evidence shows that persons occasionally though rarely crossed there the evidence shows affirmatively that the plaintiff *was not there for that purpose at that time.* Putting it most favorably for the plaintiff, he was a mere licensee for his own pleasure, at the time of the accident, and the defendant, therefore, owed him no duty, except the negative one not to intentionally injure him. The facts bring the case fully within the rule of those above cited.

Nor would the fact that plaintiff was an infant alter the rule.

In the case of Felton *vs.* Aubrey, 74 Fed. Rep. 350 (U. S. C. C. A. 6th Circuit) a verdict and judgment obtained in the court below by the defendant in error, a boy of nine years, against the plaintiff in error, as receiver of a railroad company, was reversed because of error in giving and refusing instructions. The boy was injured by being run over by a train of freight cars within the city limits of the city of Lexington, Ky. The track at the place of the accident was laid across a common, over which people passed frequently, and in so doing crossed the track at the place in question. The evidence on behalf of the plaintiff tended to show that

he crossed the track diagonally and while doing so was struck by a train going at a rapid rate, while that on behalf of the defendant tended to show that he tried to board a car of the passing train and was thrown and run over. In speaking of the youth of the plaintiff, and the necessity of the defendant exercising greater care towards him than an adult, the court also stated that however young the plaintiff the defendant would not be liable unless it was guilty of negligence, and in that connection said :

> "If there was no breach of duty, then there was no wrong, irrespective of the boy's capacity to know that what he was doing was dangerous. We do not think this distinction was made plain to the jury."

After quoting from the charge upon the question of contributory negligence, the court said :

> "This charge is subject to the criticism that the jury might well infer that the immatureness of the plaintiff would excuse his conduct, and cast a liability upon the company, not because it had been guilty of any wrong, but because an immature and irresponsible person had been hurt without fault of the railway company."

Speaking of the liability to trespassers and licensees, the court said :

> "So there are many cases which seem to recognize no distinction whatever between the liability to implied licensees upon the premises of a railroad company at places where the company is legally entitled to the exclusive occupation and those who go upon the premises as mere naked trespassers. In both cases the company has been held to come under no duty or obligation towards such persons until their danger is apparent. Of this class of cases the following may be cited as types" (citing cases).

The case last cited shows that the duty to a licensee is the same, and only the same, as to a trespasser. The cases

all agree that the only duty which a railroad company owes to a trespasser is the negative one not to intentionally injure him.

Morrissey *vs.* Eastern Railroad Company, 126 Mass. 377 :

Defendant's railway train ran over and injured a child four years of age, walking on its track. The place in question was a cutting through a ledge, near which the plaintiff lived with his mother. There were houses on both sides of the track upon the ledge and beyond it, and the cutting was unfenced at both ends. The cutting was 400 feet from the public street, but people were accustomed to pass through it.

The upper court, in sustaining a verdict for the defendant, said:

> "The plaintiff at the time of the accident was a mere intruder and trespasser upon the railroad track. No inducement or implied invitation to him to enter upon it had been held out. He was neither a passenger nor on his way to become one, but was there merely for his own amusement, and was using a track as a playground. The defendant corporation owed him no duty, except the negative one not maliciously or with gross and reckless carelessness to run over him."

Baltimore & Ohio Railroad Co. *vs.* Schwindling, 101 Penn. St. 258 :

A boy, five or six years old, went for his own amusement on the platform of a railway station, and stood at the edge to watch an approaching train. The train drew up at the rate of three or four miles an hour, and an iron step, bent and projecting a few inches outward, struck and injured him.

The plaintiff had judgment below.

The court, in reversing judgment for the plaintiff, said:

> "At the time plaintiff received his injury he was

standing on the platform of the defendant, so close to its edge that according to the theory upon which the case was tried for the plaintiff, he was struck by a slight projection from the side of a passing freight car. He was not a passenger, he had no business of any kind with the defendant or any of its agents or employees; in fact he was a boy about five or six years of age amusing himself, looking at the moving train. He was not invited upon the platform by any agent of the defendant, and he was not engaged in the act of crossing either the track or the platform at the time of the accident. He was simply loitering upon the edge of the platform with no other purpose or motive than his own personal enjoyment." . . .

"When the right to cross at a particular place is established, by permission or otherwise, the duty of ordinary care is incumbent upon the company. But in the present case the plaintiff was not engaged in the act of crossing the track or even the platform when he was injured, and therefore the cases on this subject are not in point."

See, also, the case of C. A. & C. Ry. Co. *vs.* Workman, Admr., 66 Ohio State, 509, which shows that the plaintiff in this case should be considered a licensee.

C and D.

Points C and D present the question of THE ALLEGED NEGLIGENCE OF THE MOTORMAN.

Where a person is discovered lawfully or unlawfully on the track in front of an approaching train, the motorman or engineer may properly presume that the party will leave the track in time to avoid injury, unless or until he discovers something to indicate that the person can not or will not do so, and if he uses all available means to stop the train as soon as he makes such discovery, he is not guilty of negligence. This rule applies in cases of infants old enough

to have appreciation of danger. The following cases fully support this rule:

R. & D. R. R. Co. *vs.* Didzoneit, 1 D. C. App. 482.
Cullen *vs.* R. R. Co., 8 D. C. App. 69.
Stabenau *vs.* R. R. Co., 155 N. Y. 511.
Fenton *vs.* Second Ave. R. R. Co., 126 N. Y. 625.
Chrystal *vs.* T. & B. R. R. Co., 105 N. Y. 164.
P. R. R. Co. *vs.* Hummell, 44 Pa. St. 379.
Foley *vs.* N. Y. C. & H. R. R. Co., 78 Hun, 248.
Alabama G. S. R. Co. *vs.* Burgess, 114 Ala. 587.
P. R. R. Co. *vs.* Morgan, 82 Pa. St. 134.
Norwood *vs.* R. & G. R. Co., 111 N. C. 236.
High *vs.* C. C. R. Co., 112 N. C. 385.
B. & O. R. R. Co. *vs.* Schroeder, 69 Md. 558.
Nellis on Street Railways, p. 302.

In the case of the Richmond and Danville Railroad Co. *vs.* Didzoneit, 1st Appeal Cases, D. C. 482, the court, in its opinion, states the material facts as follows:

"The plaintiff, a boy about sixteen years of age, was injured at Manassas, in the State of Virginia, on August 24, 1889, by having his foot crushed by an engine attached to a freight train of the Richmond and Danville R. R. Co., while he was sitting on a platform adjacent to the company's track with his foot on the rail, . . . and, it seems, went to sleep. While he sat there, a freight train came up from the south and stopped in front of a hotel about forty yards from the place where the boy was. A street intervened between the hotel and the platform, but the track was quite straight for a considerable distance.

"The engineer of the freight train alighted from his engine, as he says, to receive orders. Returning to his engine, he set it in motion in order to proceed onwards. Immediately after starting, he noticed the boy sitting on the platform, with his head resting on his hand and his face turned southward in the

direction from which the train was moving. When he got closer, he noticed that the boy's eyes were closed, and he immediately reversed his engine and stopped the train, which was not moving at a greater rate than three or four miles an hour. It was too late, however. One wheel of the engine passed over the boy's foot and partly crushed it. The engineer stated in his testimony that, while he noticed the boy after he had started his train, he did not stop immediately because he supposed the boy would move; and he did not notice that the boy had his foot on the rail. These are the substantial facts of the case as they were developed at the trial" (pp. 483–4).

In that case the question was whether the plaintiff should be excused for his contributory negligence on the ground that the defendant might, by the use of due diligence, have avoided the consequence of the plaintiff's negligence and avoided the injury; but the same rule would apply to the case at bar in determining that whether the conduct of the motorman was negligent. Upon this question the court, after referring to other cases, said:

"From this it is plain that the defendant's liability in such cases is based upon the fact that it had, or must have had, actual knowledge of the plaintiff's danger, and that the negligence for which it is responsible is negligence supervening after discovery of such danger." . . .

"In the present case there is no proof whatever that the defendant at any time before the accident knew the existence of the dangerous condition in which this plaintiff had improvidently placed himself. That dangerous condition is assumed to have been that the boy was asleep on the platform, in too close proximity to the railroad track. According to the uncontradicted testimony of the engineer, the fact that the boy was asleep did not become apparent to him until it was too late to prevent the accident; and there is nothing in the circumstances of the case that would justify the presumption that his state-

ment was false, or that he had knowledge of the boy's condition, or that after his discovery of this condition he did not use all the care and prudence that he could to prevent the accident. When he first saw the boy he had no reason to suppose that the boy was not in the full possession of his senses, and would not move away, as any prudent person would do" (pp. 487–8).

The language of the court in the foregoing quotation to the effect that the uncontradicted testimony of the engineer was that he expected the boy to remove from his dangerous position, and that it did not become apparent to him that he would not do so until he was too close to him to avoid the accident, applies with great force to this case, as it was admitted by the counsel for the appellee and the court below that the motorman did all he could to stop the car after he discovered that the boy's foot was caught in the space, and the evidence on behalf of the appellee shows that the waving that was done commenced at substantially the same time that the motorman discovered that the boy's foot was fast, so that there was nothing to indicate to the motorman that the boy would not leave the track as the car approached him, as he had formerly done, until he discovered that his foot was fast.

In the subsequent case of Cullen *vs.* Railroad Co., 8 App. Cases, D. C., 69, under a similar state of facts, the same ruling was adhered to after very able arguments and a critical examination of the rule by this court.

The doctrine of these two cases applies with equal force in a case like the one at bar, where, as we contend, the plaintiff was not placed in his perilous position by any act of negligence on the part of the defendant. The rule in each class of cases is the same, that is, that in order for the defendant to be liable, there must be an independent act of negligence on its part after the actual discovery of the plaintiff's peril.

In the case of Stabenau *vs.* Railroad Company, 155 N. Y.

511, where a girl of seven years of age was injured by being struck by an electric car, there was judgment for the plaintiff in the court below. In the opinion of the Court of Appeals, reversing the judgment, the court states the facts at page 513 as follows:

> "The evidence showed the following state of facts: The plaintiff's daughter was about seven years of age. At about seven o'clock in the evening of January 19th, 1894, one of the defendant's trolley cars, on its way to Brooklyn, had left the station at Van Pelt Manor, with two motormen upon the front platform. When within less than one hundred feet of the crossing, where the accident occurred, several little girls were seen upon or near it. They were seen to start and to run over the crossing in front of the car. One of them, the plaintiff's daughter, fell and, immediately, the motorman applied the brake upon the car and brought it to a stop upon the crossing. The child's body was prostrate and outside of the track, at a point between the front and rear wheels. Upon raising up the child, examination showed that her foot and ankle had been struck by some part of the running gear and injured. Although there is no direct evidence as to how she had fallen, it might be inferred that her foot had been caught between the outside rail of the track and the plank of the crossing, with the effect that she had been unable to extricate it and was thereby thrown down. The crossing upon which the child was injured was used for traffic and the planks had become worn and broken in places. At the point where the child fell, there was a space between the outside rail and the adjoining plank of from 2 to 3 inches. There was a crossing for foot passengers; but, for the purpose of this case, the child may be assumed to have been rightly upon the traffic crossing, and the question of the defendant's negligence is to be solved by the conduct of the motorman when approaching the crossing."

On page 514 the court said:

> "The car was going at the usual rate of speed through a rural district and, although it was possible

to have stopped it before reaching the crossing, there was, obviously, no occasion to do so, until the child was seen to fall." . . .

"No negligence was attributable to him (the motorman), because he did not apply the brake before the child fell; for it was then, for the first time, that the peril became apparent" (citing Fenton *vs.* Railroad Company, supra).

On page 515 the opinion continues:

"Whether her fall was from her foot being caught, or from merely tripping, is not definitely known; nor is it, perhaps, material upon the question of the defendant's negligence; because until she was seen to fall, the motorman was under no obligation to bring his car to a stop. It was essential, in this case, to show that the defendant's servant, while engaged in the operation of the car, committed some act which he ought not to have done, or omitted some act incumbent upon him. As I regard the case, I fail to discover wherein any negligence was attributable to the defendant, which was the proximate cause of the accident."

Our case is a stronger one for reversal than the one from which the foregoing quotations are made. In that case the plaintiff was treated as rightfully upon the track, while in the present case, as hereinbefore shown, the plaintiff, if not a trespasser, was a licensee. He had no occasion to be upon the track at the time and place when and where he was.

In the case of Fenton, administrator, *vs.* Second Avenue Railroad Company, 126 N. Y. 625, the deceased, for whose death the suit was brought, a boy about nine years old, attempted to cross the street in front of an approaching car, when it was far enough from him to have enabled him to do so in safety had he not fallen. He fell on the track and the car passed over him and killed him. The evidence on behalf of the plaintiff tended to show that the boy fell when the horses were about twenty feet from him; that a person near the car saw the boy about to cross and hallooed to the

driver before the boy fell, but he was looking another way and did not attempt to stop the car until the horses struck the boy. The evidence on behalf of the defendant tended to show that the driver did not see the boy until he fell on the track about ten feet in front of the horses, and immediately did all he could to stop the car, and that he did not hear the person on the street halloa. It was alleged that the driver was negligent in not stopping the car sooner. The plaintiff had a verdict and judgment below. The Court of Appeals, in an opinion reversing the judgment, said:

> "If it be assumed that the boy fell twenty feet in front of the horses, as testified to by one of the plaintiff's witnesses, then the horses going at the usual rate of speed, assuming it to be six miles an hour, would have reached him in about two seconds, and that was all the time the drivers had to see the peril, apply the brake and arrest the motion of the car before reaching him, and there is no evidence that, by the exercise of all the vigilance that the law requires of drivers under such circumstances, they could, after the boy had fallen upon the track, have arrested the car in time to save him from injury. If it be assumed that they saw him as he approached the track they had the same reason to suppose that he would get across that he had, and he probably would have crossed in front of the horses in safety if he had not fallen. No negligence can be attributed to the drivers because they did not apply the brake before the boy fell, because then, for the first time, the peril commenced and became apparent." . . .
>
> "Street railway cars have a preference in the streets and while they must be managed with care so as not to carelessly injure persons in the street, pedestrians must, nevertheless, use reasonable care to keep out of their way. The unfortunate death of this boy was due to his own carelessness, or it was a pure accident, and in either event the defendant can not be held responsible for it."

In the case at bar the greatest distance any witness puts

the car from the boy when the waving is said to have commenced was forty-six and one-half feet, and the car was running eight or nine miles an hour, which gave about the same time in which to stop as there was in the Fenton case. In our case there was nothing to indicate danger until the waving, or the motorman saw that the boy's foot was caught, both of which occurred about the same time, according to the evidence in the record.

In the case of Chrystal *vs.* T. & B. R. R. Co., 105 N. Y. 164, an infant seventeen months old was run over and severely injured at a railroad crossing. He had a verdict and judgment below which were reversed by the Court of Appeals. From the opinion, delivered by Earl, J., we quote the following:

> "This is the first case that has come before this court, and, as far as we know, before any court in this State, wherein must be defined the responsibilities of a steam railroad company, not otherwise in fault, to one lawfully upon its track, for not seeing him and stopping its train in time to avoid injuring him.
>
> "It was in evidence, by a witness produced by the plaintiff, that plaintiff could be seen upon the track at a point about 500 feet from where he was injured. . . .
>
> "But there can be no doubt, upon this evidence, that after the engineer discovered that the child was in peril he did all he could to arrest the motion of the train. That he wilfully and recklessly ran upon him after he discovered that he was in peril is inconceivable, and certainly can not be assumed. An engineer is not bound to stop his train the moment he sees some living object upon the track. He has the right, in broad daylight, when his train is perfectly visible and its approach must be heard and known, at least in the first instance, to assume that the object, whatever it is, will leave the track in time to escape injury. He is not bound to expect helpless infants upon the track without sufficient knowledge or ability to escape when warned of danger. He

> could not know when he first saw the plaintiff that he was too young to be conscious of the danger to which he was exposed, and without the imputation of negligence he could run on until he discovered that he was heedless of the danger."

In the case at bar the plaintiff was old enough to appreciate danger and escape it, and the motorman was justified in assuming that he would do so until he discovered that he could not.

In the case of P. R. R. R. Co. *vs.* Hummell, 44 Pa. St. 379, where a boy seven years old was injured, while walking beside a train that crossed his father's lot a few feet from the house, it was contended that the company was guilty of negligence in not ringing a bell and looking out for children who were known to frequent the place, there was a verdict and judgment for the plaintiff, and in reversing it upon the ground that there was no negligence proved, because the defendant owed the plaintiff no duty, the court, by Mr. Justice Strong, amongst other things, said:

> "Precaution is a duty in so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act."

In the case of Foley *vs.* N. Y. C. & H. R. R. Co., 78 Hun. 248, a boy between four and five years old was killed by walking along a railroad track, where it had been customary for people to walk. In an opinion affirming the judgment of the trial court in directing a verdict for the defendant, the Supreme Court of New York said, on page 251 of the reporter:

> "The engineer was on his guard, and his testimony is all we have to prove what he saw. He did see the children and sounded the alarm, but he was not then bound to stop his train, as it was light and there was no noise to drown the blast of the whistle; he had a right to assume that the children

would hear the alarm and leave the track, as there was no difficulty in their so doing. They had only to step aside a few feet upon the other track, and he could not assume that either of them would fall.

" 'All the engineer was bound to do after the discovery of the peril was to use reasonable diligence and care to avoid it.' "

In the case of Alabama G. S. R. Co. *vs.* Burgess, 114 Ala. 587; s. c., 22 Southern Rep. 169, in which a boy seven years of age was injured by being run over by a train while he was crossing a trestle, and there was a verdict and judgment for the plaintiff, the Supreme Court of Alabama reversed the case because of error in giving the following instruction:

"The court charges the jury that, if they are reasonably satisfied, from the evidence, that the engineer saw the child on the track and saw that he was in peril, in time to avoid injuring him by the exercise of reasonable diligence, and they further believe that the engineer failed to exercise such reasonable diligence to avoid injury to the plaintiff, such failure would be wanton negligence, and the plaintiff would be entitled to recover such damages as the jury think he is entitled to recover in this case, not exceeding $25,000, if the jury believe plaintiff was injured by the failure to use reasonable diligence to avoid plaintiff's injury."

The ground of error, as stated by the court in its opinion, is to the effect that the instruction was too general and did not define to the jury what the duty of the engineer was under the particular facts of the case. In other words, that it failed to inform the jury that if he used all reasonable means of stopping the train after he discovered the plaintiff in peril that there was no negligence.

In the case of Norwood *vs.* R. & G. R. Co., 111 N. C. 236; s. c., 16th Southeastern Reporter, 4, where a man was run over by an engine while he was walking on the railroad

track or sitting on the end of cross-ties at a place where persons were accustomed to walk on the right-of-way, the Supreme Court of North Carolina, affirming a judgment for the defendant directed by the court below, said:

> "If it were conceded that the engineer saw the deceased walking along the track or sitting upright on the end of a cross-tie, in time to have stopped the train without peril or difficulty, he was justified in believing up to the last moment, in the absence of knowledge or information that he was insane or deaf, that intestate would take reasonable precaution for his own safety by moving out of the way. McAdoo *vs.* Railroad Co., supra; Daily *vs.* Railroad Co., 106 N. C. 301, 11 S. E. Rep. 320. It is not material whether (in passing upon the questions involved in this case) the intestate went upon the road under a license or as a trespasser. 'The license to use does not carry with it the right to obstruct the road and impede the passing of trains.'"

In the case of High *vs.* C. C. R. Co., 112 N. C. 385; s. c., 17th S. E. Rep. 79, where a woman was run over and injured under like circumstances mentioned in the next preceding case, there was similar action on the part of the court, and in the opinion it is said:

> "Where an engineer sees, on the track in front of the engine which he is moving, a person walking or standing, whom he does not know at all, or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid the injury; and if such person is injured the law imputes it to his own negligence, and holds the railroad company blameless."

In the case of B. & O. R. R. Co. *vs.* Schroeder, 69th Md. 551, where a person was run over and killed on the tracks of the railroad company in the city of Baltimore, a judgment for the plaintiff was reversed. In the opinion of the

court, delivered by Mr. Chief Justice Alvey, it is said on page 558 of the report:

> "But where a party is discovered on the track, in the exercise of full power of locomotion, and no impediment to his escape, those on the train may well act upon the assumption that he will use his senses for his protection, and get out of the way of danger before he is struck."

Frost et. al. *vs.* R. R. Co., 96 Mich. 470:

Plaintiffs, at the time of the accident, were attempting to cross the defendant's tracks with a sled, on which they were hauling logs. While standing on the crossing, the horses being unable to move the load, a train ran into the sled and killed two horses. The engineer testified that it may have been five seconds from the time he first saw the object till he whistled for the brakes. The Supreme Court of Michigan, in reversing a judgment for the plaintiff, said:

> "There is no evidence that the engineer did not use every effort to stop the train as soon as he saw the danger." . . .
>
> "The engineer was not called upon to check the speed of the train until he was signaled, or was near enough to see the danger himself."

As shown under the preceding point, the plaintiff if not a trespasser was a mere licensee, and the duty of railroad companies to infant trespassers or licensees is stated in Elliott on Railroads, sec. 1259, as follows:

> "In actions for injuries to children, as in other cases, there can be no recovery unless defendant has been guilty of a breach of duty. . . . There is a sharp conflict among the authorities, however, as to what the duty of a railroad company is to children who come upon its premises as trespassers or mere licensees. We believe the true rule to be that, although the age of the child may be important in determining the question of contributory negligence,

> or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers or bare licensees, not invited or enticed by it, than it is to keep them safe for adults."

It was suggested in the court below that the defendant might be liable upon the principle laid down in the turntable and similar cases, but it is clear that that principle does not apply here, as is shown by the opinion of the Supreme Court of Rhode Island in Bishop *vs.* Union R. R. Co., 14 R. I. 314, a case similar to the one at bar, where that court after citing Railroad Company *vs.* Stout, 17 Wall, and two others, involving the same principle, said:

> "We know of no cases more favorable to the plaintiff than the three cases last cited, but in all three of them the object which caused the injury was a dangerous object left exposed, without guard or attendant, in a place of public or common resort for children. An object so left is a standing temptation to the natural curiosity of a child to examine it, or to his instinctive propensity to meddle or play with it." . . . The court adds: "The case at bar differs very much from the three cases previously stated, for in the case at bar the cars, instead of being left unattended, were in the charge of the driver, who was in the act of driving them, so that there was nothing done to encourage the trespass, which was merely the result of momentary impulse. Ordinarily a man who is using his property in a public place is not obliged to employ a special guard to protect it from intrusion of children, merely because an intruding child may be injured by it. We have all seen a boy climb up behind a chaise or other vehicle for the purpose of stealing a ride, sometimes incurring a good deal of risk. It has never been supposed that it is the duty of the owner of such a vehicle to keep an outrider on purpose to drive such boys away, and that, if he does not, he is liable to any one who is injured while thus secretly stealing a ride. In such a case no duty of care is incurred."

Many cases are cited in that opinion sustaining the point. See, also, cases on same point cited in a note in 3 Am. Neg. Rep. p. 320.

In the case of Pa. R. R. Co. *vs.* Morgan, 82 Pa. St. 134, the facts were quite similar to those in the present case. They are stated as follows by the reporter:

> "At the trial it appeared that at about five o'clock in the afternoon of October 15, 1874, a gravel and repair train, consisting of an engine, ten dump and truck cars, and a caboose car, was backing on the Morrison Cove Branch, on a slightly down grade, with the caboose car on the front and the engine on the rear. The train hands in charge consisted of a fireman and a flagman, both of whom were on the front of the caboose car upon the lookout, and also of the engineer and a brakeman, both of whom were upon the engine.
>
> "The place at which the accident occurred was a sparsely-settled district just outside the borough lines of Hollidaysburg.
>
> "The evidence as to the speed of the train at the time was conflicting; for the plaintiff there was evidence tending to prove that the speed was very great, but the evidence of the defendant, which seemed to have more weight, was that the train was not moving faster than six miles an hour, the rate allowed by the rules of the company.
>
> "There was but a very slight curve in the road at this point, and nothing to obstruct the view of the track for a long distance. As the train approached a private crossing, and when it was at the distance of about 520 feet from the crossing, the hands on the front of the train saw the plaintiff, then a child of about five years of age, and a little boy, upon the track at this crossing. Nothing was then done to stop the train. When within 163 feet of the children one of the train hands called to the children to get off the track. They started to run off immediately; the boy ran straight across the track and got safely off; the girl started to run diagonally off, and in doing so caught her foot inside the rail, and between it and

> the plank, in the space left for the flange of the wheel. As soon as the train hands saw her predicament, the train then being within about 100 feet of the child, they applied the brakes, and signalled the engineer, who reversed the engine. Although every possible exertion was used, it was impossible to stop the train until the front car had run about 60 feet past the crossing. Meantime the child's mother and one of the neighbors had run to her assistance and endeavored to extricate the foot. Not being able to do this in time, as the train passed, they held the child's body as far out of the way as possible, so that the front wheel of the caboose car, sliding under the pressure of the brake, appeared to have pushed the plaintiff's foot out of her shoe, lacerating the foot and producing, as was testified, a permanent injury. The shoe was left sticking in the space between the rail and the plank, where it was first caught." . . .
>
> "There was some evidence that the plaintiff's foot was caught in a hole outside of the track, negligently left there by the defendant, but the weight of the evidence was clearly that the hole was, as above stated, inside of the rail.
>
> "It did not appear that the plaintiff was lawfully upon the track at the time of the accident. The crossing upon which she was playing at the time was entirely a private one, the use of which was confined to a few families, including that of the plaintiff, but it was built and maintained by the company." . . .

Speaking of the manner in which plaintiff's foot was caught, the court said, at p. 139:

> "We concur in the view of the judge that the foot of the plaintiff must have been caught in the space left for the flange of the car wheels, between the rail and the inner plank of the crossing, and, therefore, that the injury arose from no defect in the construction of the crossing." . . .

In that case it appeared as in this that the persons in charge of the train saw the plaintiff when far enough away to have stopped the train before reaching her, and the court below, as stated by the Supreme Court in its opinion,

charged the jury substantially that if the defendant's employees in charge of the train had time to stop it after discovering the plaintiff, they were guilty of negligence in not doing so. Speaking of the charge and the case of P. & R. R. R. Co. *vs.* Spearen, 11 Wright, 300, from which it was taken, the Supreme Court said:

> "But that case states no inexorable rule, that a train must stop under all circumstances when a child is seen upon a track; on the contrary, if its appearance there is so sudden and unexpected that the engineer is incapable of exercising the necessary measure of care to save it, the child is without remedy. In principle this is not different from a case where a sudden change of circumstances causes an accident to a child, where immediately before there was no reason to believe an injury would ensue."
>
> 82 Pa. St. 141.

And the court held that the instruction was erroneous, and reversed a judgment in favor of plaintiff.

It will be observed by reference to plaintiff's instruction No. 1 (Rec. p. 38), given in the case at bar, that the court below upon the point in question charged the jury substantially as was done in the Pennsylvania case.

The plaintiff, to sustain his contention in the court below that the case should be submitted to the jury, and that the instructions asked on behalf of the defendant should not be granted, relied largely upon the case of Spooner *vs.* D. L. & W. R. R. Co., 115 N. Y. 22. While the facts in that case were similar to those in the case at bar, and were submitted to the jury, there was a conflict of evidence in that case upon both grounds of alleged negligence. The plank between which and the rail the child's foot was caught had been recently placed there, before the accident, in repairing the crossing, and was different in construction from other planks at that and other crossings on that and other roads. Upon that point the court said, at pages 31 and 32 of the report:

> "The plank at the point of the accident was new

> and laid parallel with the rail on its inside and two and a half inches therefrom. It was laid with a straight edge, and the opening thus made for the flanges of passing wheels was the one in which the child's foot was caught. The other planks at the same crossing had the edge of the plank parallel to the rail beveled off or rounded, so that at the bottom it touched the rail and the flanges had room to pass-while no opening, such as to catch or fasten an in, cautious foot, was left. There is evidence that a similar mode of construction existed at many other crossings of the company, and was uniformly used upon some other railroads, although many retained the straight edges."

There were no such facts appearing in the case at bar, and no evidence whatever given on behalf of the plaintiff tending to show defective or improper construction. The testimony of Mr Lewin, in behalf of the plaintiff, did not tend to show that the construction at the two crossings mentioned by him was different from that where the accident happened. The crossings mentioned by him were where vehicles crossed the tracks and his evidence showed that the depth of the space between the plank and the track was somewhat filled with earth, while the evidence on behalf of the defendant showed that it is customary to have men go along constantly and clean them out. The clear inference from the opinion in the Spooner case is that, if there had been no conflicting evidence in that case upon the question of negligent construction, an instruction that the jury could find no negligence in that particular would have been proper. Certainly that case supports the position that the defendant's fifth instruction (Rec. p. 40) should have been given.

Also upon the question of whether the engineer was guilty of negligence in not stopping the train sooner the evidence in the Spooner case differed widely from that in the present case. In that case the evidence showed that the

engineer did not check his train as soon as he saw the plaintiff upon the track waving her hands. Upon that point the court said, at page 33:

> "Between Roseville station and the Greenwood avenue station there is no obstruction to the view in either direction, except possibly the bridge over the track, which was eight hundred and fifty-four feet from the scene of the accident. The plaintiff saw the train beyond the bridge at Roseville. The engineer while at that station either saw or might have seen the plaintiff upon the track. At all events, he did see her as he passed the bridge. He then saw a small child upon the track waving her hands and not stepping aside. He should have checked his train at once. There was ample time in which to do it, for he swears that he could and did stop it within three hundred and sixty feet. On this state of facts the action of the engineer raised a question of negligence for the jury, and it was for them to say whether he ought not to have acted sooner in presence of what he saw before him."

In our case the motorman testified that he saw no waving of hands by plaintiff or any one else. The testimony, on behalf of the plaintiff, shows that the car was too near the plaintiff to be stopped when the plaintiff and his brother commenced waving their hands. That distance was stated by them to be from 47 to 28 feet (Rec. pp. 10 and 11). The motorman says he was about 30 to 35 feet away from the boy when he saw that his foot was caught, and he then stopped his car as soon as he could. According to the evidence, he commenced to stop the car about the time the boys commenced to wave (Rec. p. 19). It is admitted that after the motorman saw that the plaintiff had his foot fast he stopped as quickly as it was possible to do so. See record, page 46, where the court said, in its charge:

> "Of course it is admitted by counsel, and they will not undertake to escape from that admission, that as soon as the motorman saw that the boy's foot was

> caught there, he did everything to stop the car that he could do. I have no doubt the motorman did that."

In this state of the evidence there was nothing upon which to base a finding that the motorman was guilty of negligence, and that question should not have been submitted to the jury.

In the Spooner case, inasmuch as the evidence tended to show that the engineer did not check his train as soon as he saw the plaintiff waving her hands, the question of his negligence was properly submitted to the jury, but in that case the court instructed the jury as follows upon that point:

> "If, as soon as the engineer saw the plaintiff fall upon the track, or discovered that, for some reason she could not or might not get out of the way in time, he made diligent use of all the means at his command, in order to stop the train and avoid injuring the plaintiff, he did all that he was required to do, and was guilty of no negligence."

On the same page the Court of Appeals, speaking of the instruction asked by the defendant in that case to the effect that the engineer had the right to act upon the assumption that the plaintiff would step aside, and which was refused by the court below, said:

> "That would have been true if all that the engineer could see was a young child on the track (Crystal *vs.* Troy & Boston R. R. Co., 105 N. Y. 164). But when he reached the bridge more than that was obvious. Ethel did not move aside, and was waving her hands and trying to signal the engineer. While he could not see her foot fast in the crossing, he could see that for some reason she did not leave the track and that something unusual had happened. He should have taken the alarm at once and was imprudent for his delay."

It is submitted that the instruction given in the Spooner case was substantially the equivalent of defendant's instructions numbered two and six (Rec. pp. 39, 40, and 41), and what is said by the court in that case shows that our instructions last above referred to should have been given.

Specification of Errors in Instructions and in Refusing to Instruct.

In view of the principles established by the foregoing authorities, it is submitted that the court should have directed the jury to find a verdict for the defendant upon the whole evidence, as requested by defendant's counsel (Rec. p. 38). There was no sufficient evidence to sustain a verdict holding the defendant guilty of negligence, either in the construction of the track at the point in question or in the management of the car.

Defendant's instructions numbered two and three (Rec. p. 39) requested, after the court had rejected his first prayer, present, separately, first, that there was no sufficient evidence to go to the jury upon the allegation of negligent construction; and second, that there was not sufficient evidence upon the allegation of negligent movement of the car, and then ruled adversely to defendant upon each proposition.

There can be no controversy but that the evidence produced on behalf of the defendant established the fact that the construction of the track at the point of the accident was in accordance with the usual and customary method of construction; that it had been in common use in the District of Columbia and elsewhere for many years; that no accident had happened in the District of Columbia because of such construction, and that the officers and agents of the defendant had no notice or knowledge that any such accident had ever happened elsewhere prior to the one in question. There was no evidence introduced on behalf of

the defendant tending to show that there was a better or safer construction and none that any other or different construction had ever been in use here or elsewhere. Nor is there anything in the construction that would indicate to a reasonably prudent person that such an accident was likely to occur. That only two or three cases are found in the books where a similar accident has occurred is conclusive evidence that the contingency of such an accident was very remote and not likely to be suggested to the mind of the most prudent until after its occurrence. Under such circumstances it was error to submit to the jury upon the evidence in the record the question of whether the construction was negligent.

It was also error to submit to the jury the question of whether the motorman was negligent. The foregoing authorities establish fully that the motorman or engineer has the right to assume that the person in front of an approaching car will leave the track if he has notice of the approach in time to enable him to do so, and that he may continue to run on with the usual speed until he shall discover something to indicate to a reasonably prudent man that the person can not or will not leave the track. The motorman under the facts proved in this case had every reason to believe that the plaintiff would leave the track. The gong was repeatedly sounded while the car was sufficiently far from the plaintiff to enable him to do so. He had always done so before that time. He and other boys with whom he associated had frequently prior to the accident stood upon the track until the car was close and then jumped off. The motorman had no reason to suppose that the same occurrence would not be repeated on the occasion of the accident until he saw something to indicate the contrary. He says that the first thing he saw to indicate the contrary was when he was within about 30 or 35 feet of the plaintiff and discovered that his foot was caught between the rail and plank. It was testified by some witnesses that

the plaintiff and his brother waved their hands or hats. The motorman testifies that he did not see such waving. The plaintiff and his brother testified that when they commenced waving the car was from 28 to 48 feet from the plaintiff. It, therefore, appears from all the evidence on behalf of both parties that the motorman discovered that the boy's foot was caught about simultaneously with the waving. That was the first notice he had that the boy was in peril. He testifies that he did all that was possible to stop the car from that time on, and it is admitted that he did so. The court in its charge to the jury (Rec. p. 43) said:

> "Of course, if he (the motorman) saw that the boy's foot was caught it must be his duty to stop just as soon as he can in order to prevent the accident. I have no doubt he did that."

And again the court said (Rec. p. 46):

> "Of course, it is admitted by counsel (for plaintiff), and they will not undertake to escape from that admission, that as soon as the motorman saw that the boy's foot was caught there he did everything to stop the car that he could do. I have no doubt the motorman did that."

It therefore appears conclusively that the motorman did all that under the authorities or in accordance with common experience could be required of him.

But even if it had been proper to submit the case to the jury upon either proposition, the court erred in submitting it. It will be seen by reference to the first instruction given at the instance of the plaintiff that the question of negligence in both instances was submitted to the jury at large without any direction whatever from the court to them as to the duty of defendant in construction, or the duty of the motorman in relation to the movements of his car. The

jury by that instruction were directed to find for the plaintiff—

> *"if they find that leaving the opening in the condition in which it was when the plaintiff's foot was so caught therein was not a reasonable and safe method of maintaining the crossing, or that by the exercise of reasonable diligence on the part of the motorman who had charge of the car which injured the plaintiff he could have stopped the car before it reached the plaintiff"* (Rec. p. 38).

There is not a word in the instruction from beginning to end indicating what was the duty of the defendant as to construction, and it was left to the jury to conjecture as best they could in their own minds, or speculate as they might upon the duty of construction. Proper construction is a mixed question of law and fact. It is error to leave the entire question to the jury, as is shown by the opinion of this court in the case of Asphalt Co. *vs.* Mackey, *supra*, and other cases hereinbefore referred to. It is a well established principle of law that usual and ordinary construction is not negligent construction, unless it be manifestly so to the ordinary mind, and the jury should have been given proper instructions upon this point. Such proper instructions were asked on behalf of the defendant in his instructions 4 and 5 and refused by the court (Rec. pp. 39 and 40).

From the above quotation from complainant's first instruction, it also appears that the jury were given no information whatever as to the duty of the motorman under the circumstances of the case. But, on the contrary, it seems to be intimated by the language—

> *"or that by the exercise of reasonable diligence on the part of the motorman who had charge of the car which injured the plaintiff he could have stopped the car before it reached the plaintiff,"*

that if the jury found from the evidence that he saw the plaintiff on the track when he was far enough away from

him to have stopped the car before he reached the plaintiff it was his duty to do so, which is clearly erroneous. That this is the meaning which the court itself attached to the language quoted is shown by the language of the charge (Rec. p. 43), where the court says:

> *"Should he (the motorman) have anticipated that there might have been some kind of danger there, and should he have stopped his car or gotten it under control before he even saw any signal or waving or before he saw that the boy's foot was caught."*

If that instruction be correct it would be the duty of a motorman or engineer as soon as he saw a person on the track in front of him to commence to stop his train or car in time to come to a standstill before he should reach the spot where he saw the person. That rule applied especially for street cars in cities would render street car traveling nearly or quite as slow as walking, and is unreasonable. It is true, of course, that if a motorman sees upon the track a child apparently so young as not to have any discretion or sense of fear whatever, it would be his duty to stop as soon as he was near enough to discern that the child was of that character, but that does not apply in a case like the present, where the plaintiff was old enough to understand and appreciate the danger of being struck by a car. The rule in cases like the one now before the court is so firmly established by the authorities at the present day as scarcely to admit of discussion. See especially Pa. R. R. Co. *vs.* Morgan and other cases hereinbefore cited. The defendant requested the rule applicable to the case to be given to the jury by the fourth and sixth instructions (Rec. pp. 39, 40, and 41), which the court rejected.

There is nothing in the charge to cure the errors committed by the court by granting the plaintiff's first instruction and rejecting those of the defendant. The jury were nowhere told throughout the whole charge anything that

would indicate to their minds what was the duty of the defendant in relation to construction or the motorman as to the movements or stopping of his car. The charge does little more than define negligence and then leaves the case at large to the jury to speculate whether upon the facts they should find the defendant negligent or not.

Mental Suffering.

There was error in the second instruction, given the jury at the instance of the plaintiff, in that the court instructed that they might consider and allow the plaintiff as one of the elements of damages "*for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg*" (Rec. p. 38). This instruction separated mental suffering from physical suffering and permitted the jury to consider, as a separate element of damages, injury to the plaintiff's feelings, mental pain, humiliation, and grief which he had experienced or might in the future experience from the contemplation of his maimed condition. If the "past" mental pain referred to in the instruction might be considered as connected with and growing out of the physical pain connected with the crushing, amputation, and healing of his leg, the "future" mental suffering therein referred to could have no connection with physical suffering, as there was no evidence tending to show that there would be any physical suffering in the future. The instruction must have been intended by the plaintiff's counsel and the court to refer to mental suffering, anguish, and humiliation, arising from a contemplation of the loss of his leg. Counsel for plaintiff argued to the jury for an enhancement of the damages upon this distinct ground, and counsel for defendant could not object, because under the instruction such argument was proper. This was not a proper element of damages to be considered by the jury, for it is well settled that mental pain, not directly or necessarily connected with the physical pain, is

not a proper element to be considered by the jury in assessing damages.

Bovee *vs.* Danville, 53 Vt. 153.
Chicago & Grand Trunk Ry. Co. *vs.* Spurney, 69 Ill. App. 549.
Giffen *vs.* City of Lewiston, 55 Pac. 545; s. c., 6 Idaho, 231
Morse *vs.* Ducan, Receiver, 14 Fed. 396.
Chicago R. I. & P. Ry. Co. *vs.* Caulfield, 63 Fed. 396.

Bovee *vs.* Danville, 53 Vt. 183, was an action for damages to plaintiff occasioned by her being thrown out of a buggy, by reason of unsafe condition of a roadway. As a result of the injury the plaintiff was prematurely delivered of twin living children, both of whom died. The verdict was for plaintiff. The court instructed the jury that "if this miscarriage was brought about by this injury, any suffering occasioned thereby, *any injuries to her feelings* should be compensated."

In an opinion, reversing the case for error in giving this instruction amongst others, the court, upon the question of damages, said (p. 190):

> "Upon the question of damages the fact of Mrs. Bovee's miscarriage was made prominent at the trial. In the notice a threatened miscarriage is set forth, and in the declaration the actual fact is alleged as one of the injuries sustained. The proofs disclosed the fact that this plaintiff was prematurely delivered of twin living children. The plaintiff was entitled to recover all damages that were naturally and legitimately consequent upon the neglegence of the town. If the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject of compensation. But the rule goes no farther. Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote

> to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If like Rachel she wept for her children and would not be comforted, a question of continuing damage is presented, too delicate to be weighed by any scales which the law has yet invented."

In Chicago & Grand Trunk Ry. Co. *vs.* Spruney, 69 Ill. App. 549, the plaintiff was injured through alleged negligence of defendant, whereby he lost a leg. In an opinion, reversing a judgment for plaintiff on the ground of misdirection to the jury, the court said:

> "At the instance of the plaintiff the jury were instructed that in determining the amount of damages they might take into consideration 'any future bodily mental pain or suffering, or future inability to labor or transact business, if any, that the jury believe from the evidence the plaintiff will sustain by reason of injuries received.'
>
> "Future mental pain, that is, mere humiliation and grief resulting from a contemplation of a maimed and disfigured body, is not an element entering into an ascertainment of the pecuniary damage one has sustained as the result of negligence," citing I. C. R. R. Co. *vs.* Cole, 165 Ill. 334.

In the case in 165 Ill. counsel for plaintiff argued to the jury that they might enhance the damages by taking into consideration the plaintiff's mental anguish arising from the contemplation of his physical condition caused by the injury. Upon that point the court, at page 339 of the report, said:

> "These remarks of counsel are improper to the extent that they seek to have the jury infer that their verdict might include damages for future mental anguish which might be suffered by the plaintiff from a contemplation of what might occur. This is not the law nor is it a proper element of damage."

The case was not reversed because the counsel for defendant took no exception to the language of plaintiff's counsel.

In Chic. City Ry. Co. *vs.* Manger, 105 Ill. App. 579, the court, speaking upon the proper measure of damages in a personal injury case, said:

> "In an action predicated upon negligence to recover for personal injuries thereby sustained, a plaintiff is not entitled to damages for mere humiliation or mental annoyance, which he may suffer on account of bodily injuries. Instructions stating the elements of suffering or loss, on account of which a plaintiff is entitled to recover, should not be so drawn as to include mental humiliation."

In the case at bar the instruction was so drawn and no other reasonable meaning can be attached to it, and the jury must have so understood it. The large amount of damages is indicative of this.

In Giffen *vs.* City of Lewiston, 55 Pac. 545; s. c., 6 Idaho, 231, the plaintiff, a woman, fell into an unguarded hole in the sidewalk and was disfigured. The court, in reversing a judgment for plaintiff, said:

> "The trial court did not err in instructing the jury that disfigurement of the plaintiff caused by the injury complained of is an element of damage to be considered by them. Such disfigurement is an element of damage; but annoyance to the plaintiff caused by contemplation of disfigurement is too remote to be considered as an element of damage resulting from personal injury."

In Morse *vs.* Duncan, Receiver, 14 F. 396, plaintiff missed his train by reason of the failure of train to stop at regular station. It was claimed that he could recover for the pain of mind occasioned thereby, but the court said:

> "The general rule is that 'pain of mind' is only the subject of damages when connected with bodily

> injury. It must be so connected in order to include it in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity."

In Chic. R. I. & P. R. Co. *vs.* Caulfield, 63 F. 396, the plaintiff, a boy nine years of age, was run down by a train after he had been seen by the engineer, had a verdict and judgment which was reversed for errors, amongst which was the one specified below. The case was heard on appeal before Caldwell, Sanborn, and Thayer, circuit judges, and the court said:

> "The court instructed the jury that in assessing the plaintiff's damages they had a right 'to take into consideration his mental suffering because of his crippled condition, and to take into consideration his physical suffering endured by him while his wounds were healing.' The allusion thus made to 'mental suffering' induced by the plaintiff's crippled condition, as distinguished from 'physical suffering' appears to have been to those feelings of mortification which the plaintiff might experience in after life because he was not sound in body and limb. If such was the idea intended to be conveyed by the instruction, then we think the court erred in allowing the jury to assess damages of that nature" (citing Bovee *vs.* Danville, 53 Vt. 190).

Future Pecuniary Loss.

The specification in the second instruction asked and granted on behalf of the plaintiff that the jury should allow the plaintiff "*for such pecuniary loss as the direct cause of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs*" (*Rec. p. 38*), was also erroneous. In the second preceding part of the instruction the jury were told to allow him for the pain resulting from the injury, for the loss of his leg, and for the inconvenience he has and will in the future suffer from the loss thereof. By

the latter part of this instruction there is superadded the elements of "mental suffering" and "pecuniary loss." The element of mental suffering we have already shown was erroneous. There was no evidence to justify the submission to the jury of the question of pecuniary loss. In order to justify the submission to the jury in such a case, of the question of future pecuniary loss, there must be evidence tending to prove future disability to engage in the plaintiff's usual avocation, and whether such disability is permanent or how long it will continue, what the plaintiff's occupation was and what he could or did earn before the accident, and whether he is wholly or only partially disabled. There is no evidence in the record upon either of these points, and in the nature of the case there could be none. But because the plaintiff was so situated that he could not produce evidence upon this point does not change the rule of law. The plaintiff was not old enough to have any earning capacity. He never had acquired one. If he lives he probably will acquire one in the future. Whether that will be greater or less than it would have been if he had not lost his foot was and is entirely a matter of speculation. Nothing could have been more speculative than to let the jury guess whether the plaintiff's earning power when he becomes an adult will be greater or less than if he had not lost his foot. This is plainly in violation of the rule against the allowance of remote and speculative damages, and the following cases support the principle here contended for:

Staal *vs.* R. R. Co., 107 N. Y. 625.
Strohm *vs.* R. R. Co., 96 N. Y. 305.
Leeds *vs.* Gas Co., 90 N. Y. 28.
Ry. Co. *vs.* Marcus, 2 Am. Neg. R. 490; s. c., 115 Ala. 389.
City of Denver *vs.* Sherrett, 88 F. 226.

Staal *vs.* R. R., 107 N. Y. 625, was an action to recover damages for personal injuries caused by defendant's negligence, where no evidence was given as to the circumstances

and condition in life of plaintiff, his earning power, skill, and capacity. It was held that no damages for future pecuniary loss could be awarded. Part of the charge objected to was: "The jury may allow him his pecuniary losses resulting from his disabilities owing to this accident." This being objected to, the court added: "What the court . . . told you as to pecuniary losses was in connection with the future."

This was held such error as to require reversal.

In Strohm *vs.* R. R. Co., 96 N. Y. 305, the court said;

> "Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible, are not proper to be considered in ascertaining damages."

Could anything be more uncertain and speculative than the future earning power of the plaintiff in the case at bar?

In the case of Leeds *vs.* Gas Co., 90 N. Y. 28, the court charged that the plaintiff was entitled to recover for loss of time. Evidence had been given of such loss, but none tending to show plaintiff's business or his earning capacity. The court, in reversing a judgment for plaintiff for this sole ground of error, said:

> "The charge, therefore, can only be defended upon two grounds—either that evidence of the value of the lost time was given, or, if not, that the jury were at liberty to guess at and speculate upon that value, and estimate it as they pleased. The first ground we have shown to be untenable, and the exception, consequently, requires us to determine the second." . . .
>
> "They were bound to consider it of some value, but could not go beyond nominal damages, and give

compensation for it upon an arbitrary standard of their own. This they were permitted to do. Without proof of the extent or character of the plaintiff's pecuniary loss, they were left to fix it as they pleased." . . .

"For pain and suffering, or injuries to the feelings, there can be no measure of compensation, save the arbitrary judgment of a jury. But that is a rule of necessity. Where actual pecuniary damages are sought, some evidence must be given showing their existence and extent. If that is not done the jury can not indulge in an arbitrary estimate of their own."

In Ry. Co. *vs.* Marcus, 2 Am. Neg. R. 490; s. c., 115 Ala. 389, the plaintiff, nineteen years old, fell from a hand-car, whereby his spine was injured, and he was permanently paralyzed and crippled. He had judgment below. In reversing it the court said that it was an error to instruct the jury, in the measure of damages, as to probable earnings where there was no evidence as to plaintiff's earning capacity. What the charge was is not reported.

The City of Denver *vs.* Sherrett, 88 F. 226, was an action brought by a woman for injuries sustained by reason of her falling into an excavation. On the question of damages the trial court charged:

"If she is under further disability, if these injuries are permanent in their character, so that she will not hereafter be able to resume her occupation, or resuming it, can not perform the service as efficiently as before, she is entitled to compensation in the degree in which she loses the power to earn money. So that, if you think her powers are permanently impaired, that she will hereafter not be able to carry on her occupation as school teacher, for the length of time for which she is withdrawn from her occupation, she is entitled to such money as she could earn during that time, whether it be one year or more."

In holding this instruction erroneous Judge Shiras, delivering the opinion of the Circuit Court of Appeals, said:

> "In cases wherein the evidence shows that the injury received will affect the ability of the party in the future to earn money, compensation must be made therefor; but the rule is not that the jury must determine the number of years that the disability will continue to exist, and then multiply this number by the yearly compensation the party has earned in the past. Damages for future losses in cases of this kind are not susceptible of computation by a strictly mathematical calculation. Evidence may be given of the age of the party injured, the probable duration of life, the effect the injury has had upon the ability of the person to earn money, of the probability that the injurious effect on the ability to earn money will continue in the future, either during life or for a lesser period, and of the business or occupation in which the person was engaged, and the compensation, whether by wages, fees, by a fixed salary or profits that resulted therefrom; and, from the facts thus proven in evidence, it is for the jury to award such fair sum as will, in their judgment, compensate the party for the decreased or destroyed ability to earn money in the future, due allowance being made for the contingencies and uncertainties that inhere in such matters."

The case last cited well states the facts that must be proved in order to justify the submission of the question of future earning capacity to the jury.

Even if the loss of earning capacity were a proper element of damages the court erred in granting the plaintiff's second instruction because the language of it is such that the jury were permitted to enhance the damages by the loss of earning capacity during the minority of the plaintiff, which is not a proper element of damage in this case. The loss of

earnings during minority could only be recovered by the father.

Texas & P. Ry. Co. *vs.* Morin, 66 Tex. 225.
Ry. Co. *vs.* Evansick, 63 Tex. 54.
H. & T. Ry. Co. *vs.* Boozer, 8 Am. St. R. 615.

In the case of Texas & P. Ry. Co. *vs.* Morin, 18 S. W. 503; 66 Tex. 225, the plaintiff, a child about two and a half years old, recovered a verdict for $20,000 for injuries sustained by reason of negligence of defendant. On question of damages the court instructed the jury:

> "In the event you find damages for the plaintiff in estimating the same you will take into consideration the proof, if any there is, showing the physical condition of the plaintiff at and since the alleged injuries, the probable effect of the injuries in the future upon his health and upon his use of his limbs and generally, and reduction of his power and capacity to earn money, and to pursue the course of life he might but for the injuries, but damages in this cause if any can in no event extend beyond a fair and reasonable compensation for the injuries, and you can not under the pleadings and evidence award exemplary damages, that is, damages by way of punishment."

In reversing the judgment for this error, the Supreme Court of Texas said:

> "This charge was erroneous, in that it permitted the jury to consider in estimating the damages the diminished capacity of the appellee to earn money during the time intervening between the injury and his arrival at majority," citing:
>
> Ry. Co. *vs.* Miller, 51 Tex. 275.
> Sawyer *vs.* Sauer, 10 Kan. 519.

In Ryler *vs.* Evansick, 63 Tex. 54, where a judgment for plaintiff was reversed on the like ground, the court said:

> "The court below having enumerated, in the

charge given, the elements of damage which the jury might take into consideration in a case in which a minor brings suit to recover for injuries to himself, instructed the jury that they might give damages for temporary bodily disability.

"The father of the appellee had recovered for such temporary disability as may have resulted to the appellee to the time of his majority.

"Temporary bodily disability, as an independent element of damages, has relation solely to inability or diminished capacity to labor, and in so far as an injury may affect this, in a case of a minor having a parent entitled to his services, the injury is in legal contemplation to the parent, who alone may recover therefor.

"We regard it as elementary that 'a minor son owing services to his father can not recover for loss of time or inability to labor or earn money during the period of his minority,'" citing cases.

It was also error to instruct the jury, as was done in plaintiff's second instruction (Rec. p. 38), to the effect that they might render a verdict for the full amount of $25,000, claimed in the declaration. That sum was clearly excessive, and the court should not have intimated to the jury that it would be proper for them to award that amount, and the qualification attempted to be made of this in the charge did not cure the error. What the court there said was simply that the instruction was not a suggestion that they should take the $25,000 as a criterion. But he did not say that it would not be proper for them to award $25,000. The substance of the instruction still was that it would be proper for them to award the plaintiff $25,000 if they saw proper to do so. Any reasonable man would say that such a verdict was excessive and therefore illegal. They were in substance told that they had the right to be unreasonable. Such an instruction was held to be error by the Supreme Court of New York in the recent case of Gilbertson *vs.* Ry. Co., 1 Am.

Neg. Rep., 513; s. c., 14 App. Div. (N. Y.), 294. Speaking of that instruction, the court said in that case:

> "Upon the termination of the judge's charge the counsel for the plaintiff made the following request: 'I ask your honor to charge the jury that, taking all the elements into consideration, the jury may award her compensation, fair, reasonable, and just, to any amount not exceeding thirty thousand dollars.' This the court charged and the defendant excepted. This was an intimation to the jury that, under the evidence which had been produced upon the trial, they would have had the right to render a verdict for $30,000, which was clearly not the fact; and this intimation upon the part of the court in regard to the nature of the evidence may have affected their consideration, and may have been in some degree the cause of the large verdict which was rendered. Such a charge was eminently calculated to mislead the jury, and to cause them to regard the evidence of the injuries sustained as of greater gravity than its actual purport required. The learned court did not charge that the plaintiff claimed $30,000, and that the jury were entitled to award such sum as the evidence justified, not exceeding that amount; but did charge them that they might award $30,000, clearly intimating that such a verdict might be upheld upon the evidence in the case. It is evident that a verdict for any such sum would have been extremely excessive. It is also quite clear that the verdict actually rendered was larger than the evidence in the case seems to justify."

This brief was prepared and used by the counsel who appeared for the appellant in the Court of Appeals, and the questions of law presented in this court being the same as were argued and disposed of in the lower court, and the discussion of all of these questions was so full

and elaborate, the counsel appearing in this court on behalf of the plaintiff in error deem it unnecessary to do more than to submit to this court the argument that was filed in and submitted to the Court of Appeals.

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